No. 62.

Bf. of Bromberg & Lewis for P. E.

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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 62

THE MOBILE TRANSPORTATION COMPANY,
Plaintiff in Error,
vs.
THE CITY OF MOBILE,
Defendant in Error.

Error to the Supreme Court of Alabama.

BRIEF FOR PLAINTIFF IN ERROR.

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[10-4-'02]

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 274.

THE MOBILE TRANSPORTATION COMPANY,
Plaintiff in Error,

vs.

THE CITY OF MOBILE,
Defendant in Error.

Error to the Supreme Court of Alabama. Brief for the Plaintiff in Error.

Statement of the Case.

In 1867, in some way, an act was procured to be passed by the Legislature of Alabama, which was approved January 31, 1867, and which appears in the Pamphlet Acts of Alabama of 1866–67 at page 307, and which is as follows, viz:

"AN ACT

Granting to the city of Mobile the riparian rights in the river front.

SECTION 1. Be it enacted by the senate and the house of representatives of the State of Alabama, in General Assembly convened, That the shore and soil under Mobile river, situated within the boundary lines of the city of Mobile, as defined and set forth in section 2 of "An Act to incorporate the city of Mobile, approved February 2nd, 1866, be and the same is hereby granted and delivered to the city of Mobile.

SECTION 2. Be it further enacted, That the mayor, aldermen and common council of the city of Mobile, be and are hereby created and

declared trustees to hold, possess, direct, control and manage the shore and soil herein granted, in such manner as they may deem best for the public good.

Approved January 31st, 1867."

Soon after the passage of this act an attempt was made by the authorities of the City of Mobile to interfere with the owners of all the private wharves in front of the City ; whereupon these owners filed a bill in chancery in the United States Circuit Court for the Southern District of Alabama, to enjoin the City from asserting any right or claim under said law, and from interfering with the possession, use, or profitable enjoyment of said wharf property.

A perpetual injunction was granted by the United States Circuit Court, as prayed for. From this decree an appeal was taken to this Court December 8, 1869, where said appeal was dismissed by agreement, and the mandate of this Court accordingly issued directed to the said Circuit Court, October 30, 1874. The decree thus affirmed by this Court finds as follows :

" 1. It appears to the Court that under titles derived from the United States, under Acts of Congress for the settlement of land claims in the districts of land in which the City of Mobile was included and originating in concession by the French, British or Spanish Government, or under Acts of Congress for the sale or transfer of lots in Mobile, the west bank of the river Mobile, within the corporate limits of Mobile, is vested in individuals and also an important portion of the river front to the channel of the river is held by those titles.

2. That from the establishment of Mobile as a port of entry there has been a custom for the riparian owners to erect wharves in front of their lands and to collect wharfage for the use of the same. That the improvements for this purpose have tended to ameliorate the sanitary condition of the City, extend facilities to commerce and have proved a public benefit. That these improvements have been recognized and sanctioned in the laws of the State and the ordinances and administration of the City government and that a large amount of capital has been invested in the same which has been subject to taxation and borne city charges, and they have been constantly regarded as private property, and at no time a hindrance to the public right of navigation, or have been deemed to be a nuisance.

3. That the corporate authorities of the City of Mobile, are not

authorized by their charter, nor anything contained in the Act approved the 31st January 1867 by the body calling itself the "General Assembly" which purports to grant the shore and soil of the river Mobile to the City, and certain powers to the corporate authorities, nor by the authority of that act to declare the wharves to be free and open to the public, or an infringement of public rights, nor to impede, obstruct or prevent the collection of wharfage by the proprietors of the same or to prevent the use of the same as private property in lawful ownership.

* * * * * * *

5. That the plaintiffs to the bill, and persons made defendants therein with similar interests are entitled to the relief prayed for, and to be quieted in their title."

Leverich vs. City of Mobile, S. C. U. S. Oct. Term, 1874, No. 2.

This decree was respected and no further action taken under said act of January 31, 1867, until December 14, 1896, more than twenty years after the affirmance by this Court of the above described decree of the United States Circuit Court. Then a complaint was filed against plaintiff in error, in the Circuit Court of Alabama for Mobile County, in the name of the City of Mobile as plaintiff.

This complaint was in the form prescribed by the Code of Alabama for ejectment.

The description of the land sued for states that it is a part of the middle division of the Bernoudy Tract, having seven hundred and thirty feet front along the channel line of Mobile River, and extending shorewards nearly two acres. (Trans. pp. 26 & 27.)

By the Statute of Alabama the defendant in ejectment has a right to demand of the plaintiff an abstract in writing of the title or titles on which he will rely for a recovery, and the plaintiff is confined to the proof of such title or titles.

Code of Alabama, 1886, sec. 2697. (In force at the time of trial).

Under this statute plaintiff in error demanded an abstract of the City's title to the land sued for: Having reference to the abstract thus furnished the plaintiff in error by the City, plaintiff in error filed six special pleas, setting forth the title of the defendant in error and showing it was based entirely upon the act of January 31, 1867. (Trans. pp. 30 to 33).

These pleas were stricken out on motion of the City. (Trans. pp. 33 to 34).

The plaintiff in error then suggested on the record its adverse possession of the lands sued for, for more than three years, in accordance with the provisions of the Code of Alabama, 1886, section 2702. (Trans. p. 34).

And also demurred to the complaint :

" 1st. Because the lands sued for are under the ebb and flow of the tide.

2nd. Because the complaint seeks the recovery of possession of the soil under the ebb and flow of the tide.

3rd. Because this suit is for soil under the navigable waters of this State."

These demurrers were overruled, (Trans. pp. 35, 36), and the plaintiff in error then pleaded " not guilty". All subsequent proceedings are shown in the bill of exceptions. (Trans. page 41, *et seq.*)

At the trial the City introduced as evidence in its behalf the Act of Congress to enable the people of Alabama Territory to form a State government :

The ordinance of Alabama, August 2, 1819, ordaining, amongst other things, " That all navigable waters within this State shall forever remain public highways, free to the citizens of this State and of the United States, without any tax, duty, impost, or toll therefor, imposed by this State : and this ordinance is hereby declared irrevocable, without the consent of the United States ".

Also, the resolution of Congress declaring the admission of the State of Alabama into the Union, December 14, 1819 :

The act of the Legislature of Alabama of January 31, 1867, above set forth :

The act of February 18, 1892, entitled " An act to fix the right of the city of Mobile to certain real estate : Also, an act amending this act :

Also, the charter of the city, referred to in the act of January 31, 1867, and then rested. (Trans. p. 45).

No witness was examined by the defendant in error during the trial, in its behalf.

When the defendant in error offered in evidence the act of January 31, 1867, the plaintiff in error objected to its introduction as evidence before the jury, upon the following grounds, among others :

" 3. Because the act is void as being *ultra vires*, because the

State is a trustee of the shore and soil under the Mobile River, not only for the people of Alabama, but the whole United States, and cannot divest itself of its trusts.

4. Because the act impairs vested private rights, because riparian rights are property, and because the rule in Alabama is that a grant by the United States of land bordering on navigable river includes the shore or bank of such river and extends to the water line at low water.

Because accretions belong to the riparian owner.

6. Because the plaintiff is no longer in existence; because its existence was terminated by the act to provide a charter for the city of Mobile, approved February 6, 1897, p. 542 Pamph. Acts of Ala. 1896–'7.

7. Because the act shows on its face that the plaintiff is barred by the statute of limitations of twenty years.

8. Because the act does not give the city of Mobile any right of possession.

9. Because the act is immaterial and irrelevant. The suit is for land between low and high water mark, and the act grants and delivers to the city of Mobile only the shore and soil under Mobile river within the boundary lines of the city of Mobile.

10. Because said act does not show that the State had any legal estate in the lands described therein such as it could grant and deliver to the city of Mobile at the time of the passage of said act.

11. Because said act does not show that the State had any right of possession to the shore and soil under Mobile river described in said act at the time of the passage of said act". (Trans. pp. 44, 45).

The Court overruled these objections, and admitted the act as evidence before the jury, to which ruling of the Court the plaintiff in error excepted.

Plaintiff in error offered in evidence so much of volume three of the American State Papers "in relation to the public lands" as forms part of the "Register of claims to lands in the district east of Pearl River, in Louisiana, founded on private conveyances, which have passed through the office of the commandant, but founded, as the claimant supposes, on grants lost by time or accident", and relates to the claim of Regis Bernoudy, numbered "11", on page 30 of said printed volume. And also offered in evidence so much of said volume three of the American State Papers "in relation to the public lands" as appears on pages 400, 401,

and 402, of said volume, as report numbered "9", "Report on the conflicting claims of Joseph McCandless and Regis Bernoudy, both of whom claim the same tract of land, and in relation to whose claim the former commissioner reported favorably."

The plaintiff in error also offered in evidence the treaty of 1819 between the United States and Spain, as printed in the United States Statutes at Large, in the volume entitled "Revised Statutes of the United States relating to the District of Columbia, Post-roads, and Public Treaties", 43rd. Congress, 1873-1875, at pages 712 to 718, inclusive: Also, specially, article VIII of said treaty on page 714:

Also, the patent of the United States to George Poe and William H. Robertson, the assignees of Regis Bernoudy, the claimant referred to in 3rd. American State Papers:

The field notes upon which the patent is based:

And a series of deeds of conveyance and wills, constituting the chain of title of the plaintiff in error from the Spanish claimant down to the plaintiff in error. (Trans. pp. 46 to 89, inclusive): Each of which was excluded by the Court upon objection of the defendant in error, as immaterial and irrelevant.

The plaintiff in error afterward offered all of the foregoing evidence again, *seriatim*, for the purpose of showing color of title in plaintiff in error to the lands sued for.

The Court again, upon objection of the defendant in error, excluded this evidence as immaterial and irrelevant for that purpose. (Trans. p. 75).

The plaintiff in error then offered evidence to show that it, and those under whom it derived title, had been assessed by the City as the owners of this land, and paid taxes to the City for it from 1867 down to and including the year of trial.

The Court excluded this evidence, upon objection of the defendant in error, as immaterial and irrelevant. (Trans. pp. 69, 70 and 80 to 86).

The plaintiff in error proved that its grantor, Mary E. Barnewall, was one of Jonathan Emanuel's heirs, and that the property conveyed to her by plaintiff in error was derived by her from her said father.

The Court, however, excluded all evidence offered by the plaintiff in error to show improvements made upon said lands by driving pilings in front of it. (Trans. p. 71).

And all offers of evidence by the plaintiff in error to show ad-

verse possession of the lands described in the complaint, notoriously, continuously, adversely and under color of right for twenty years before the bringing of this suit, were rejected by the Court. (Trans. p. 72).

The City Engineer was put upon the stand by the plaintiff in error (Trans. p. 73), and the question put to him, viz., "State is there such a thing known on the river front as a fixed high-water mark line on the lands sued for ".

The question was excluded, upon objection of the defendant in error, as immaterial and irrelevant.

All questions of the plaintiff in error tending to elicit from the witness the fact that there was piling and wharves in front of the lands, and grading for a railroad track upon this land, and improvements upon the land, were also excluded as immaterial and irrelevant. (Trans. p. 74).

All questions by plaintiff in error tending to elicit evidence to show improvements made upon this land more than three years before the bringing of this suit were excluded as immaterial and irrelevant. (Trans. p. 75).

To all the adverse rulings of the Court the plaintiff in error duly reserved exceptions.

At the request of the defendant in error the Court gave the general charge, and refused charges requested by the plaintiff in error, as shown more particularly in the assignments of error hereinafter set forth.

The Supreme Court of Alabama affirmed every ruling of the trial Court.

Specification of Errors.

The Supreme Court of Alabama erred in affirming the judgments of the Circuit Court of Mobile County in rendering the judgment, viz:

1. " That the plaintiff have and recover of the defendant the following tract of land described in the complaint as follows, viz., situated in the city and county of Mobile and state of Alabama, and more particularly described as follows, viz: Commencing on the south line of the middle division of the Bernoudy tract where said boundary intersects the high-water mark, said point being eleven hundred and fifty-six feet east of the west line of

Water street, measured on said boundary line, thence south eighty-two degrees east four hundred feet, more or less, to the channel line adopted by the Mobile River Commission; thence northwardly along said channel line seven hundred and thirty feet, more or less, to the southeast corner of Sullivan Timber Company's wharf; thence north eighty-two degrees west three hundred and seventy-five feet, more or less, to a point on said high-water mark six hundred feet east of the west line of Water Street, measured on the continuation of said line; thence southwardly along the high-water mark seven hundred and fifty feet, more or less, to the place of beginning, together with the sum of sixty-five dollars ($65.00) for the detention thereof, as so assessed by the jury, together with the costs in this behalf expended, for which let execution issue for said lands, together with the sum of sixty-five ($65.00) dollars for the detention thereof and all costs". (Trans. pp. 3, 37 and 38).

2. In overruling the demurrer of the plaintiff in error to the complaint, viz., " Because the lands sued for are under the ebb and flow of the tide ". (Trans. pp. 4, 35 and 36).

3. In overruling the demurrer of the plaintiff in error to the complaint, viz: " Because the complaint seeks the recovery of possession of the soil under the ebb and flow of the tide ". (Trans. pp. 4, 35 and 36).

4. In overruling the demurrer of plaintiff in error to the complaint, viz: " Because this suit is for soil under the navigable waters of this State ". (Trans. pp. 4, 35 and 36).

5. In overruling the demurrer of plaintiff in error to the complaint, viz: " Because the complaint seeks to recover possession of navigable waters of this State in an action of ejectment ". (Trans. pp. 4, 35 and 36).

6. In overruling the objection of plaintiff in error to the admission in evidence of the Act of the General Assembly of Alabama, approved January 31, 1867, entitled " An act granting to the City of Mobile the riparian rights in the river front ", as found in Pamph. Acts of Alabama, 1866–67, page 307, and in admitting the same in evidence. (Trans. pp. 4, 44 and 45).

7. In overruling plaintiff in error's objection to the admission of said Act of January 31, 1867, upon the ground that "the act is void as being *ultra vires*, because the State is a trustee for the shore and soil under Mobile river, not only for the people of Alabama, but the whole United States, and cannot divest itself of its trusts" and in admitting the same in evidence. (Trans. pp. 4, 44 and 45).

8. In overruling plaintiff in error's objection to the introduction in evidence of said Act of January 31, 1867, and in admitting the same in evidence, "because the act impairs vested private rights, because riparian rights are property, and because the rule in Alabama is that a grant by the United States of land bordering on navigable river includes the shore or bank of such river, and extends to the water line at low water.

Because accretions belong to the riparian owner." (Trans. pp. 4, 44 and 45).

9. In overruling the objection of the plaintiff in error to the introduction in evidence of said act of January 31, 1867, and in admitting the same in evidence, "because the plaintiff is no longer in existence, because its existence was terminated by the act approved February 6, 1897, page 542 of the Pamph. Acts of Alabama of 1896–97." (Trans. pp. 4, 44 and 45).

10. In overruling the objection of plaintiff in error to the introduction of said act of January 31, 1867, and in admitting the same in evidence, "because the act shows on its face that plaintiff is barred by the statute of limitation of twenty years." (Trans. pp. 5, 44 and 45).

11. In overruling the plaintiff in error's objection to the introduction in evidence of said act of January 31, 1867, and in admitting the same in evidence, "because the act does not give the city of Mobile any right of possession." (Trans. pp. 5, 44 and 45).

12. In overruling the plaintiff in error's objection to the introduction in evidence of said act of January 31, 1867, and in admitting the same in evidence, "because the act is immaterial and irrelevant. The suit is for land between low and high water mark, and the act grants and delivers to said city of Mobile only the

shore and soil under Mobile river, within the boundary lines of the city of Mobile." (Trans. pp. 5, 44 and 45).

13. In overruling the plaintiff in error's objection to the introduction in evidence of said act of January 31, 1867, and in admitting the same in evidence, "because said act does not show that the State had any legal estate in the lands described therein, such as it could grant and deliver to the city of Mobile at the time of the passage of said act". (Trans. pp. 5, 45).

14. In overruling the plaintiff in error's objection to the introduction in evidence of said act of January 31, 1867, and in admitting the same in evidence, "because said act does not show that the State had any right of possession to the shore and soil under Mobile river, described in said act, at the time of the passage of said act". (Trans. pp. 5 and 45).

15. In overruling the plaintiff in error's objection to the introduction in evidence of the act to incorporate the city of Mobile found in the Acts of Alabama of 1866, page 202, being the act referred to in the act just preceding offered, giving the limits of the city, and in admitting the same in evidence. (Trans. pp. 5, 45).

16. In overruling the plaintiff in error's objection to the introduction in evidence of the act approved February 18, 1895, to be found in the acts of the General Assembly of Alabama of 1894-95 page 115, entitled "An act to fix the right of the city of Mobile to certain real estate" and in admitting the same in evidence. (Trans. pp. 5, 45.)

17. In overruling the plaintiff in error's objection to the introduction in evidence of the act found in the Acts of the General Assembly of Alabama of 1896-97, page 50, entitled "An act to amend an act entitled 'An act to fix the rights of the city of Mobile in certain real estate, approved February 18, 1895,'" and in admitting the same in evidence. (Trans. pp. 5, 6 and 45).

18. In sustaining the defendant in error's objection to and in excluding from evidence "so much of volume 3 of the American State papers in relation to the public lands as forms part of the registry of claims to lands in the district east of Pearl river, in

Louisiana, founded on private conveyances, etc., as relates to the claim of Regis Bernoudy, numbered 11, on page 30 of said printed volume." (Trans. pp. 6, 45.)

19. In sustaining the defendant in error's objection to and in excluding from evidence "so much of said volume 3 of the American State papers in relation to the public lands as appears on pages 400, 401, and 402 of said volume, as report number 9, 'Report on the conflicting claims of Joseph McCandless and Regis Bernoudy, etc.'" (Trans. pp. 6, 46 & 47).

20. In sustaining the defendant in error's objection to and in excluding from evidence both of said reports referred to above when offered to show color of title. (Trans. pp. 6, and 75).

21. In sustaining the defendant in error's objection to and in excluding from evidence the treaty of 1819 between the United States and Spain as printed in the United States Statutes at Large in the volume entitled "Revised Statutes of the United States Relating to the District of Columbia, Post-roads, and Public Treaties", Forty-third Congress, 1873–'75, at pages 712 to 718. (Trans. pp. 6, & 47).

22. In sustaining the defendant in error's objection to and in excluding from evidence article VIII. of said treaty, on page 714 of said volume, specially offered by the plaintiff in error. (Trans. pp. 6, 47).

23. In sustaining the defendant in error's objection to and in excluding from evidence the patent of the United States to George Poe, William H. Robertson, and Philip McLosky, assignees of Regis Bernoudy, for section thirty-eight, in township four south, range one west, containing five hundred and seven acres and seventy-six hundredths acres, in the district of land subject to sale at St. Stephens, Alabama, dated the 28th of December, 1836. (Trans., pp. 6, 47 & 48).

24. In sustaining the defendant in error's objection to and in excluding from evidence the field notes entitled "Com'r. rt. No. 10, claim No. 11, sec. 38, township 4 south, range No. 1 west, St.

Stephens land district of Alabama". (Trans. pp. 6, 7, 48 & 49 & 50).

25. In sustaining the defendant in error's objection to and in cluding from evidence the copy of the tax-lists of the city of Mob from 1867 down to and including 1878, being Exhibit "B" to bill of exceptions. (Trans, pp. 7, 69, 70, 80 and 81).

26. In sustaining the defendant in error's objection to and excluding from evidence the tax-lists of the port of Mobile and of Mobile from 1879 down to and including 1897, Exhibit " to the bill of exceptions. (Trans. pp. 7, 70, 82, 83 & 84.)

27. In sustaining the defendant in error's objection to and in cluding from evidence the receipts and tax bills of the city of Mo for the years 1894, '95, '96 and '97, Exhibits "D", "E", "F", 'G" to the bill of exceptions. (Trans. pp. 7, 70 & 71, 84, 85, 8 87).

28. In sustaining the defendant in error's objection to and in cluding from evidence any testimony whatever in regard to the p ment of taxes to the city of Mobile offered by the plaintiff in er (Trans. pp. 7, 70 & 71).

29. In sustaining the defendant in error's objection to and in cluding the plaintiff in error's question to the witness William Ba wall, viz: "Did you ever have charge and control of said lands (Trans. pp. 7. & 71).

30. In sustaining the defendant in error's objection to and excluding from evidence the plaintiff in error's question to witness, Barnewall, viz.: "Did you or not ever drive piling in f of this land which is marked 'Emanuel est.,' being the same sol the transportation company by your wife?" (Trans. pp. 7 & 71

31. In sustaining the defendant in error's objection to and excluding the plaintiff in error's question to the said witness, v "When was it you drove those pilings?" (Trans. pp. 7 & 71).

32, In sustaining the defendant in error's objection to and excluding the plaintiff in error's question to the said witness, v "Did you or not pay taxes on the lands that were sold by

wife to the Mobile Transportation Company ?" (Trans. pp. 7 & 71).

33. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to the said witness, viz. : " Look at the copy of the tax-list, Exhibit " B ", and state whether or not the land described in there," etc., " was the land sold to the Transportation company by witness's wife." (Trans. pp. 8, 71 & 72).

34. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to said witness, viz. : " Whether or not the property assessed in Exhibit " C " to Mary E. Barnewall is the same property sold by her to the Transportation company." (Trans. pp. 8, 72).

35. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's offer of the oral evidence of Mr. Barnewall, John Hogan, and others tending to show adverse possession of the lands described in the complaint, notoriously, continuously, adversely, and under color of right, for twenty years before the bringing of this suit (Trans. pp. 8, and 72).

36. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to the witness D. M. N. Ross, viz : " Please examine the field-notes from the office of the secretary of state at Montgomery, Alabama, as shown by the copy made April 27, 1894, of section 38, township 4 south, range 1 west, St. Stephen's land district of Alabama, and state whether or not the land just pointed out on that map as covered by the description in the complaint is included within the boundaries so far as the west, south and north boundaries are concerned ". (Trans. pp. 8, 72 & 73).

37. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to said witness, Ross, viz : " State is there such a thing known on the river front as a fixed high-water-mark line on the land sued for " (Trans. pp. 8, & 73).

38. In sustaining the defendant in error's objection to and in excluding the answer of said witness, viz : " I know the ballast was valuable for filling in ". (Trans. pp. 8, & 73).

39. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to said witness, Ross, viz: "Whether there has been any filling done on the property marked on the map 'Emanuel estate'". (Trans. pp. 8, & 73).

40. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to said witness, Ross, viz: "How long did you first notice any filling upon the part marked 'Emanuel'?" (Trans. pp. 8, 9 & 73).

41. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to said witness, viz: "Whereabouts did Barnewall drive piling in front of the Emanuel part?" (Trans. pp. 9, 73 & 74).

42. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to said witness, Ross, viz: "Are there or not wharves in front of this land described in the complaint?" (Trans. pp. 9, & 74).

43. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to said witness, Ross, viz: "Is there not the bed of a railroad track—is there not the grading of a railroad track upon this land described in the complaint?" (Trans. pp. 9, & 74).

44. In sustaining the defendant in error's objection to and in excluding plaintiff in error's question to said witness, viz: "How long ago was that grading for a railroad track built?" (Trans. pp. 9, & 74).

45. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to the witness John Hogan, viz: "Did you ever make any improvements on that marked 'John Hogan'?" (Trans. pp. 9, & 74).

46. In sustaining the defendant in error's objection to and in excluding plaintiff in error's question to said witness, Hogan, viz: If he ever made any improvements on the part of the land lying east of the line between the points numbered No. 1 and No. 4 on the map (Trans. pp. 9 & 74).

47. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to the said witness, Hogan, viz: "What is the value of the improvements made by you upon the portion of the land lying east of the lots No. 1 and No. 4 on the map?" (Trans. pp. 9, 74 & 75).

48. In sustaining the defendant in errors's objection to and in excluding the plaintiff in error's question to said witness, viz: Whether or not the improvements made by him on the portion of the land lying east of the land between the points numbered one and four were made by him more than three years before the bringing of this suit. (Trans. pp. 9, 10 & 75).

49. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to said witness, viz: Whether or not there were any improvements upon the lands marked on the map as "Emanuel". (Trans. pp. 10 & 75).

50. In sustaining defendant in error's objection to and in excluding the plaintiff in error's question to said witness, viz: "How long ago said improvements were made". (Trans. pp. 10 & 75).

51. In sustaining the defendant in error's objection to and in excluding the plaintiff in error's question to said witness, viz: "About what is the value of said improvements?" (Trans. pp. 10 & 75).

52. In sustaining defendant in error's objection to and and in excluding from evidence the papers Exhibits "B", "C", "D", "E", "F", and "G", separately, offered by the plaintiff in error as matter of estoppel by record evidence. (Trans. pp. 10, & 75).

53. In sustaining the defendant in error's objection to and in excluding *seriatim* the evidence offered again by the plaintiff in error of the evidence before offered by it from volume 3 of the American State Papers, the field-notes of section thirty-eight, the patent of the United States to Poe and Robertson, and all the certified copies of deeds and wills, probates of wills, and original deeds before offered in evidence and excluded *seriatim* for the purpose of showing color of title in the plaintiff in error to the lands described in the complaint. (Trans. pp. 10, 75 & 76).

54. In giving, at the request of the defendant in error, the following charge, viz: "The court charges the jury that if they believe all the evidence they ought to find a verdict for the plaintiff". (Trans. pp. 10 & 76).

55. In sustaining defendant in error's objection to and in refusing plaintiff in error's charge, requested in writing, viz: "The plaintiff cannot recover in this action for any of the property described in the complaint which is between high and low water mark". (Trans. pp. 10 & 76).

56. In sustaining the defendant in error's objection to and in refusing to give the charge in writing requested by the plaintiff in error, viz: "The court instructs the jury that the plaintiff cannot recover any property named in the complaint which at the time of the passage of the act approved January 31, 1867, was not under the water of Mobile river". (Trans. pp. 10, 11 & 76).

57. In sustaining the defendant in error's objection to and in refusing the plaintiff in error's request that the court give the charge in writing, viz: "If the defendant and those under whom defendant claims have owned the land on the river front to the high-water mark and which bounds the land sued for, then the plaintiff cannot recover any land covered by the description in the complaint which the jury are satisfied from the evidence is not now below high-water mark". (Trans. pp. 11 & 76).

58. In sustaining the defendant in error's objection to and in refusing the plaintiff in error's request to give the charge in writing, viz: "If the jury believe the evidence in this case they must find for the defendant." (Trans. pp. 11, 76 & 77).

ARGUMENT.

Introduction.

The judgment of the state court appealed from is in ejectment, and is not conclusive even in the state courts.

Code Ala., 1896, §1554.
Williamson v. Mayer, 117 Ala., 259.

In this case it was held that: "The common law that a judgment in ejectment is not final, is in force in Alabama, changed only to the extent that two judgments in favor of the defendant, between the same parties, in which the same title is put in issue, is a bar to any action for the recovery of the lands, or any part thereof, between the same parties, or their privies, founded on the same title".

The judgment of the Supreme Court of Alabama in this case, therefore, is not binding upon this Court.

Gibson v. Lyon, 115 U. S., 439;
Barber v. Pittsburgh Ry. Co., 166 U. S., 99.

In Alabama every issue in the original action is open to controversy in the second. The doctrine of *res adjudicata* applies to no issue on the second trial. Therefore, everything in this case is open for consideration *de novo* by this Court.

In the case of Williamson v. Mayer, 117 Ala., one of the issues was the fact of the payment of a mortgage as a bar to the suit in ejectment. This fact was considered to be open to controversy at the second trial, although found in favor of the pleader upon the first trial.

In Gibson v. Lyon, 115 U. S., 439, it is said: "As a precedent, the decision of the Supreme Court of the State, though single, is entitled to peculiar respect, because all the questions decided arise upon the local law of the State; but it cannot have conclusive force in the courts of the United States *unless it has become a rule of property*".

Burgess v. Seligman, 107 U. S., 20;
Carroll County v. Smith, 111 U. S., 556.

It makes no difference that in the cases cited from the United States Reports that this Court laid down the foregoing doctrine in

connection with suits which commenced in the United States Courts, in the course of which the decisions of the State Courts were brought into question.

In every case, the parties to any cause in this Court have entered this forum under the provisions of the Constitution of the United States. They have come through separate doors, but when once in this forum, are entitled to be placed upon the same footing as suitors, and every canon of construction applicable to a cause originating in a United States Court applies to a cause which has been brought here by a writ of error to a State Court. The principles, above cited, laid down, are those governing this Court in its consideration of this cause.

These arguments are preparatory to the main argument, and clear the way for the consideration of this appeal, freed from the weight of conclusiveness which might be otherwise assigned to the judgment of the State Supreme Court were this an action upon contract.

The authorities cited from the State of Alabama show that this decision here brought in question is not a rule of property in that State. It will be made evident that it stands alone as the first decision of the kind, and it has been brought here for review, because the plaintiff in error believes that it is in violation of the established rules of property in Alabama, and therefore in violation of the guarantees of the Constitution of the United States, and its amendments.

The case of Doe *ex dem.* Kennedy v. Bebee, *et al.*, 8 Ala., 909, cited in the brief of defendant in error, page 17, was an action of ejectment involving the title to land reclaimed from the river in front of the City of Mobile.

At the close of the opinion in that case, COLLIER, C. J., says: "It is difficult to educe a harmonious system, even from the decisions of the federal judiciary, in respect to private land claims in the States acquired from France and Spain. The only safe course is to consider no question as concluded merely because it was directly presented by the record, unless it was considered by the court. In our own adjudications, in cases of this character, we have followed precedent where it could be found; where this has been silent, we have been guided by legal analogies, assisted by such powers of reasoning as we could command. This anomalous litigation, under the influence of the statute of limitations, and other causes, must be drawing to a close, and we think the security of the individual rights renders it proper that we should do homage to the

maxim *stare decisis*, even at the expense of some inconsistency in decision, rather than unsettle the law to any great extent, with the intention of establishing more uniformity."

This Court, upon writ of error, will consider and revise the rulings of a state court in the matter of admitting evidence to establish a fact, whenever it is sought to give such evidence effect for other purposes which do involve questions giving this Court jurisdiction.

Mackay v. Dillon, 4 How., 447.

1.

1st., 8th., 54th. and 58th. Specifications of Error.

The Supreme Court of Alabama erred in affirming the judgment of the Circuit Court of Mobile.

The foundation stone of the judgment of the Circuit Court of Mobile and of the Supreme Court of Alabama, is the act of the General Assembly of Alabama, entitled "An Act granting the City of Mobile the riparian rights in the river front", approved January 31, 1867.

More than twenty years before the commencement of this suit, a court having jurisdiction construed the act of Alabama of January 31, 1867, in a case in which the City was a party, as not conferring upon the City of Mobile any rights of ownership to any part of the river front of the City; and that judgment was affirmed by this Court by the dismissal of the City's appeal.

City of Mobile vs. Leverich, October Term, 1874, Number 2 (110 Fed. Rep., 170).

Moreover, the Supreme Court of Alabama subsequently to the aforesaid decision of the United States Circuit Court had occasion to consider this same act of January 31, 1867, in the case of the Mayor, etc. vs. Moog, 53 Ala., 561, decided in 1875 or '76.

The opinion is by Justice MANNING, who was a member of the bar of Mobile when elected associate justice of the State Supreme Court. The judgment had been rendered in the Circuit Court of Mobile County, from which the City had appealed. The appellees relied upon the said act of January 31, 1867, and the same counsel represented them who represented

the City in the case of Leverich, in the United States Circuit Court. Judge MANNING, meeting their argument, said: "It is argued by counsel for appellees that the question is affected by act No. 278, 'granting to the city of Mobile the riparian rights in the river front,' approved January 31, 1867, which enacts that 'the shore and soil under Mobile river, situated within the boundary lines of the city,' be granted and delivered to the city of Mobile in trust, 'to hold, possess, direct, control and manage the shore and soil herein granted in such manner as they may deem best for the public good'."

"We do not perceive, in this enactment, the meaning suggested by the counsel of appellees. It does not express *indignation* at, does not even imply the existence of, an 'oppressive monopoly' at Mobile, extorting through a combination, exorbitant wharf charges. The direct effect of the act, *if valid*, and its object, would seem rather to be to transfer the right and power of the State in and over the shore of the river, and the soil under it, in front of Mobile to that city, to be exercised by it, as the State should exercise them, for the general good, in preventing the navigability of the river from being impaired, and in restraining purprestures along the river front below the high-water line, by prescribing the manner in which, and the extent to which, the wharves and other structures should be built into or over the water. In respect to the exercise of this power, the cases cited below might be advantageously consulted. Dutton v. Strong, 1 Black's (U. S.) 23; Yates v. Milwaukee, 10 Wallace, 497; Hagan v. Campbell, 8 Porter, 9; Pollard's Lessee v. Hagan, 3 Howard, 212." (Pages 568 and 569.)

It will be remarked that Judge MANNING questioned the validity of the act of January 31, 1867, but, without deciding that it was invalid, he said, admitting its validity, that the object of the act is simply that of regulation to protect navigation, and in the course of that, cites Hagan v. Campbell, 8 Porter, 9, wherein it is said by the Court, speaking by Chief-Justice COLLIER, viz., "But, even supposing that the Spanish grant only conveyed the title to what was known as high water mark at the time it was made, the plaintiffs then would have been entitled, as riparian proprietors, to every increase of land by alluvion. And if accretion is made impracticable without the authority of Government by the labor of some third person excluding the water from its former limits, shall such third person, who was himself a trespasser, derive a profit, or shall not he who has

been deprived of an increase of soil by natural causes, enjoy what art has reclaimed? We merely propound this inquiry; the view we have taken of the case does not render its solution necessary. We need not consider whether if the present were a controversy for land made by alluvium, the north south lines should not take the nearest course from high water mark to the river. And it is alike profitless to inquire whether one who does not own the adjoining land may erect a wharf or other improvement for the benefit of commerce between high and low water mark, since it is clear that no part of such erections can be rested upon land of a third person, *nor can such third person be excluded the use of the water, or denied other riparian rights.*" 8 Port. (Pages 33, 34.)

The act of January 31, 1867, was cited by counsel in the case of Boulo v. New Orleans R. R. Co., 55 Ala., 480. This case involved a portion of the water front of Mobile, and was decided in 1876-77.

The Court in that case, speaking by Chief-Justice BRICKELL, affirm the doctrine of Leverich v. City of Mobile, and say: "The title to the *locus in quo*, which is part of the shore of a tide-water stream, resides in the State. Its use for the purposes of commerce, by the public, is not only permissible, but is the *trust annexed to the title.* Such use is consistent with, and not in opposition, or hostility to the title. *Presumptions of grant, or of a license, when an exclusive, continuous appropriation to private use has existed for twenty years, may be indulged.* But an exclusive, hostile possession, illegal without license or grant, is essential to create the presumption". (Page 493.)

There is a line of decisions in the Alabama reports from the early days, of the State, relating to the river front of Mobile, all of which have recognized private ownership of said front. Some of these ultimately reached this Court on appeal.

1st. The case of Hagan v. Campbell, 8 Porter, 9, before cited, was decided in 1838.

2nd. The case of the City of Mobile vs. Eslava, 9 Port., 577 (16 Peters, 234), decided in June, 1839. (Cited in Mr. Smith's brief, p. 17.)

The Court, by COLLIER, Chief Justice, say: "Though the city of Mobile existed as a town long anterior to the treaties of St. Ildefonso and Paris, yet even since the latter period extensive

reclamations have been made of the shore of the river which bounds it on the east, as well by alluvion as by the employment of artificial agents. In this way several streets have been added in the eastern part of the city, running north and south, so that *at this time the principal seat of commercial business is on ground rescued from a bed of water, since the Spanish authorities yielded the possession to the United States.*" (Page 589.)

The Court further say: "The king may grant the soil of tide-waters to an individual, yet the grantee cannot so exercise his right of property as to injure the paramount right of navigation. The interest of the grantee has been aptly compared to that of a person who owns the fee simple of a road, who, when the road is discontinued, may appropriate the ground to his own purposes, but until then he cannot obstruct its passage. Lord HALE says that the *jus privatum* of the proprietor is subject to the *jus publicum* of the community. How far the grantee of the soil may make reclamations, so that he does not disturb navigation, is an interesting question, about which there is a want of entire harmony in the *dicta* and decisions on this branch of the law. All, however, agree that as the shore becomes derelict by the receding of the waters, he may appropriate it to private purposes. Angell on Tide Waters, 29, 33, 34, 135 to 143; Rex v. Lord Grosvenor, 2 Stark. 511; Blundell v. Catterall, 5 Barn. & Ald. 268; Harg. Tracts, 32; Attorney-General v. Richards, 2 Anst. 603. In Hagan v. Campbell, the confirmatory grant made by the authorities of Spain extended the title of the grantees across the shore to the channel of the river. According to the common law such grant was unobjectionable; it neither expressly or impliedly authorized any interference with the public right of navigation, nor did it appear that it had produced such a result. But if it had been attempted to be made the instrument of injury to the public, the grant would not thereby have been rendered void; the preventive power of the law, by its interposition, might have restrained it to a legitimate purpose. For anything disclosed by the record in that case, it may have been the intention to convey a title to the soil, *without conferring an authority to occupy it*, until it had ceased to be covered by the water, nor did it appear that it was occupied at an earlier period. It is, then, clear that the grant, on its face, if tested by the rules of the common law, is valid". (Pages 591 to 592.)

"The territory which had, or should be discovered in America,

being vested in the Spanish monarchs, it followed that they might create a political power there, or retain the reins of government in their own hands, and parcel out the lands to such individuals as they might, from time to time, select ; and the power created might be invested with all the incidents of property in the tide waters, of which the subject was susceptible ; or the king might confer upon his grantee a proprietorship quite as ample ". (Page 594).

Further they say : " Again, it has been held to be a legal presumption, ' that public and responsible officers, claiming and exercising the right of disposing of the public domain, did it by the order and consent of the Government in whose name the acts were done '. And consequently grants by them of the public lands, ' by color or claim of public authority, are evidence thereof, until the contrary appears by the showing of those who oppose the title set up under it, and deny the power by which it is professed to be granted '. True, ' a grant is void unless the grantor has the power to make it, but it is not void because the grantee does not prove or produce it. The law supplies this proof by legal presumption, arising from the full, legal and complete execution of the official grant, under all the solemnities known or proved to exist or to be required by the law of the country where it is made and the land is situated '. United States v. Arredondo, 6 Peters, 727 ; New Orleans, v. U. S., 10 *Ib.*, 727 ; see also 9 Cranch, 99, and 5 Wheat. 303." (Page 596.)

3rd. Magee v. Hallett, 22 Ala., 699, decided in 1853.

This was ejectment for a portion of land in the city of Mobile reclaimed from the river.

In this case the Court say : " This grant has twice been before this court ; and in Hagan v. Campbell, *et al.*, 8 Porter 9, it was held that the plat or plan of survey which accompanied made part of the grant of 1807 ; and that the north and south lines of the original grant must be extended without variation, to the channel of the river ; and that all the land lying east of said grant and the channel of the river, between such lines as extended, was conveyed by the Spanish grant to Forbes & Co. In Hallett & Walker v. Doe, *ex dem.* Hunt, 7 Ala. 882, the decision on the last point was affirmed, and we are satisfied with its correctness. It was also held in that case, that the Spanish grant, under the operation of the confirmatory act, was valid and complete by itself, requiring nothing to

be done to perfect it; that the recognition of its validity by Con gress operated as a regrant, to the full extent of the concession, an that it was superior to any incomplete grant from Spain". (Pag 714.)

The Court further say: "It results from these views, that th south boundary of the Orange Grove tract was the line marked b Collins as such in 1802, extended without variation or deflection t the channel of the river at the date of the grant in 1807; and that line drawn from that point to low water mark at the time of th trial, at right angles with the channel, is the line to which the pro prietors were entitled to claim riparian rights in that direction that the only question for the jury, in relation to the boundary o this grant, was simply to locate this line, to ascertain where it ran. (Page 717.)

But the general rule in Alabama has always been that the owne of lands bordering on a navigable river, owned to the line of lo water-mark.

The rule is laid down in Webb v. Demopolis, 95 Ala., 116. Th Court, speaking by Justice McClellan, say: "The rule whic this State has adopted and declared through this Court is that a grant by the United States to land bordering on navigable river includes the shore or bank of such river, and extend to the water line thereof at low water.—Williams v. Glover, 66 Ala 189; City of Demopolis v. Webb, 67 Ala. 670. And this doctrin was long ago applied in a case like the one at bar, this court hold ing that the dedication of a street bordering on navigable water ex tends to low-water mark.—Doe, *ex dem.* v. Jones, 11 Ala. 63. (This was also a Mobile case.) (Page 129.)

In Demopolis v. Webb, 87 Ala., 670, the Court say: "Unde our decisions, when a person owns land on a navigable river, hi ownership is held to extend so far as to embrace the land betwee high and low water marks. Williams v. Glover, 66 Ala. 189. Bu a landing, or wharf, may be private property, and the public be per mitted to use it by license or for a charge."

In Williams v. Glover, 66 Ala. 189, the Court say: "The owner ship of plaintiff extends to the margin of the water, at ordinary stage, and hence embraces the land between high and low wate marks.—Bullock v. Wilson, 2 Por. 436; Mayor v. Eslava, 9 Por 577; Howard v. Ingersoll, 17 Ala. 780, 791; 3 Kent's Com., marg 427, note *d*." (Page 193.)

This doctrine was enunciated as early as 1835, in the case of Bullock v. Wilson, 2 Por. 436.

The Supreme Court say, per Chief Justice SAFFOLD, the law to be that as enunciated by Chief Justice PARSONS, viz: that "by the common law of England, which our ancestors brought with them claiming it as their birthright, the owner of land bounded on a fresh water river, owned the land to the centre of the channel of the river, as of common right; but if his land was *bounded on the sea or an arm of the sea*, where the tide ebbed and flowed, he could not by such boundary, hold any land below the *ordinary low water mark*, for all the land *below* belonged to the king." (p. 448.)

And, further, they say: "It is obvious, however, *that with us the question does not depend on the tide, or fresh water;* that if the river has been expressly recognized as a public highway by the Federal and State governments, or even if it be of sufficient width and depth, and suited to the ordinary purposes of navigation, and the Government has not expressly granted any part of the bed, or computed it in the quantity granted, which implies an exception, as in the case of navigable water, the stream is thereby constituted a public highway, and no individual can assert any private right of soil in the bed *beyond the low water mark*" (p. 448).

In 3 Kent's Commentaries, in the edition of 1854, in the note "*b*" to star page 430 it is laid down as follows, viz: "In Alabama the rule is, that every water course, suited to the ordinary purposes of navigation, whether the tide ebbs and flows or not, is a public highway, and the riparian owner cannot assert any private right of soil to the bed of the river *beyond the low water mark.*"

"The question in that State does not depend upon the common law test of the ebbing and flowing of the tide".

The case of Bullock v. Wilson was cited in support of the principles above enunciated in the case of Bayzer v. McMillan, 105 Ala., 395, which also cites the case of Sullivan v. Spotswood, 82 Ala., 163, which was also a Mobile case, referring to waters in the immediate vicinity of Mobile, opening into the Mobile River just above the lines referred to in the Act of 1867. In that case the Court say: "The lease of the booming facilities in connection with the water front is a lease of the right of the owner, which appertains to the riparian title, to erect booms to aid in storing and floating logs to market. * * * * * * * * * The lease transfers and assigns the right to construct proper booms adjacent to the water front, subject to the public right. Its terms neither express

nor imply a right to appropriate and occupy the soil under th water"; clearly recognizing that Spotswood could have made lease of the soil under the water, and the use of it, "subject t the paramount right of free navigation". (p. 168.)

The case of Webb v. Demopolis, 95 Ala., 129, cites 11 Ala., 63 Doe, *ex dem.* Kennedy v. Jones.

This was a Mobile case involving land which this Court judiciall knows is within the limits of the river front embraced in the Act o January 31, 1867, "granting to the city of Mobile the riparia rights of the river front." In that case the Supreme Court of thi State held the following to be a good charge (page 67), viz.:

"1. If they believed that St. Louis Street had been dedicate and established under the government of Spain, as a public stree and was so recognized previous to the treaty with France, by whic Louisiana was acquired, and that it extended to the river of Mobil then the fee of the street would be in the *public, for the use of th city, that all riparian rights in front of that street would belong t the city,* that the corporation of Mobile would succeed to the Spanis town, and the city was entitled to the fee in the land. Further, th extension of the street to the river, from time to time, after th change of flags, would not prevent the corporation from holding b the same right, the *riparian right would belong to the street, and th city, and the plaintiff could not claim it.*"

This was a positive adjudication that the lands between high an low water belong to the owner of the fee of the soil adjoining th river in the city of Mobile, *and not to the State.*

In the case of Hagan v. Campbell, 8 Porter, page 33, decided i 1838, the Court say: "But *even supposing* that the Spanish gra only conveyed the *title, to what was known as high-water mark,* the time it was made, the plaintiffs would then have been entitle as riparian proprietors, to *every increase of land by alluvion.*" (Th Court holds this to be the common law doctrine. New Orlea vs. United States, 10 Pet., 717).

In Kemp v. Pollard's Heirs, 3 Ala., page 294, decide in 1842, the Court say: "What is said by the court of property in the shore passing to the State, upon i admission into the Union, *cannot,* when fairly interpreted, b understood to *mean the absolute ownership, but merely the right jurisdiction and control,* subject to the paramount right which repeatedly conceded to the public, and which the United Stat may protect".

In this the Alabama Court only continued to follow the doctrines of the courts of the State of Georgia, from which State the territory out of which the territory of Alabama was formed, was derived by cession to the United States.

In Georgia, also, the right of the owner of lands adjacent to navigable streams, extends to low water mark.

Shively v. Bowlby, 152 U. S., 25, 26.

It is seen, therefore, that the construction of the act of January 31, 1867, to the effect that it does not confer upon the State any right to interfere with the possession of the water front of the city by the owners of the lands adjacent thereto, has not only been established directly by adjudications involving the act itself, made more than twenty years before the judgments here complained of, but to be in strict accordance with adjudications involving said water front, made before the passage of said act, and in strict accordance with the general law as to ownerships of soil between high and low water mark of navigable rivers in Alabama.

These decisions certainly constitute a rule of property in the nature of a contract with the owners of lands adjacent to the Mobile river.

The recent rulings of the Supreme Court of Alabama, complained of in these proceedings, are not different in legal effect from that of a new statute enacted by the General Assembly of Alabama, affirming the contention of the City in the Leverich case and the Moog case, as to the scope and legal effect of said act of January 31, 1867.

Such legislation, unless it provided for compensation to the plaintiff in error, would be unconstitutional, because impairing vested rights.

New Jersey v. Wilson, 8 Cranch, 164;
Fletcher v. Peck, 6 Cranch, 87, 135;
Kaukauna Co. v. Green Bay, &c., Co., 142 U. S., 254.

Besides the Alabama cases heretofore cited, there are a number of decisions in the Supreme Court of Alabama and in this Court, whose record bears testimony to the fact that, to within less than two hundred feet of Royal Street, the business part of the City of Mobile is entirely erected upon reclaimed land lying between high-water mark and the channel of the river, and owned by private individuals.

These are

Pollard v. Kirby, 14 Peters, 362, 422, 423 ;
Mobile v. Emanuel, 1 How., 95 ;
(Same Case), 9 Port. (Ala.), 403 ;
Mobile v. Eslava, 16 Peters, 234 ;
(Same Case), 9 Port. (Ala.), 577 ;
Pollard v. Files, 2 How., 591 ;
(Same Case), 3 Ala., 47 ;
Watkins v. Holman, 16 Pet., 51 ;
Chastang v. Dill, 19 Ala., 421.

The map which forms part of the record in this court in the case of the City of Mobile v. Leverich, shows that there are three streets parallel to Royal Street, and wharves and the extension of streets situated between Royal Street and the channel of the river, built upon land shown by the records above to be below high water mark. In fact these lands thus originally under the waters of Mobile river constitute the entire business part of the city of Mobile.

That the decisions of the Supreme Court of Alabama have always been harmonious and consistent with the private rights of owners of land bordering upon so-called tidal waters, at or near Mobile, is shown also in the case of Sullivan v. Spotswood, 82 Ala., 163.

This was a case of a bill filed to prevent the defendant from interfering with a boom.

The opinion shows that the locus was a bayou "*within tide water*", about four and a half miles above Mobile. "It is a recess of Chickasabogue creek, which is admitted to be a navigable water, and *empties into Mobile river*, whereby the bayou has navigable communication with the river, bay and harbor of Mobile. The timber trade and interests of Mobile have largely increased during the past few years, and are still increasing ; and in consequence thereof, the value, demand, and use of bayous, such as the one in question, which afford safe and convenient room for booming and storage, have correspondingly increased." (82 Ala. Page 167.)

The court refused the injunction because the boom interfered with navigation, but they recognized the riparian rights of the owner of the land adjoining the bayou.

They say : "The lease of the booming facilities, in connection with the water front, is a lease of the right of the owner, which appertains to the riparian title, to erect

booms to aid in storing and floating logs to market. The booms may be extended far enough to reach navigable water, but at the peril of obstructing navigation. They should bear relation to the shore or bank, and to the navigable water, so that the stream shall be subject to the paramount right of free navigation. This may impair or defeat private right, but private right must yield to public right. The lease transfers and assigns the right to construct proper booms adjacent to the water front, subject to the public right." (82 Ala. Pages 168,169.)

A boom is defined in 4 Ency. Law, (2nd. Ed.), page 707, as follows, viz: "A boom is usually formed by extending a series of spars for some distance at a right angle to the shore, and then continuing them up stream, parallel to the shore, leaving the upper end open".

In the opinion in the above case of Sullivan v. Spotswood, the Court reiterate what was said in State v. Ball, 5 Por. 365, by GOLDTHWAITE, Judge, viz: "'To make a navigable stream, three circumstances must occur: 1st, the stream must have sufficient width; 2d, sufficient depth; and 3d, a freedom from insurmountable obstructions.' It is true that the *flow and ebb of the tide is not regarded, in this country, as the usual or any real test of navigability; and it only operates to impress, prima facie, the character of being public and navigable*, and to place the *onus* of proof on the party affirming the contrary. But the navigability of tidal waters does not materially depend upon past or present actual public use. Such use may establish navigability, but it is not essential to give the character". (82 Ala., page 166.)

And the counsel for the defendant in error in this case in his brief upon the motion to dismiss the appeal under rule No. six of the practice in this court, says:

"The writer of this brief is far from any desire to dispute the correctness of that policy which is announced in Webb vs. Demopolis, and which restricts common law right of the riparian owner upon navigable rivers above the tide; indeed he can see no just reason for permitting him to occupy below the high-water mark; it seems to us that there is no real distinction between a navigable stream where the tide ebbs and flows and a navigable stream where the tide does not ebb and flow; the distinction was adopted in England because it was regarded as a reliable test of navigability, and it should be wholly discarded in America where it is known to

furnish no test whatever. Far from complaining that our court has abandoned the test in part, I am quite sure that the logical solution of the question is to abandon the distinction *in toto* since it is entirely inapplicable to our surroundings. The distinction has been wholly abandoned in many states, and in every instance where it has been wholly discarded, the riparian owner has been restricted to high-water where the stream was navigable, and in no single instance has his title ever been extended where the tide ebbs and flows". (Page 21).

Yet the Supreme Court of Alabama in this case, whilst explicitly denying any purpose to disturb the rule in Webb v. Demopolis, 95 Ala., 126, but disregarding all previous decisions affecting Mobile and Mobile river, base their decision upon the ground that the lands the subject of this suit are tide water shores. (Record, p. 108).

But in the face of the long list of decisions of the same court, practically recognizing the rule of Webb v. Demopolis, as extending the whole length of Mobile river, as well as the extent of Spanish, French and English grants to the channel of the river ; and, also, the right of private owners to lands reclaimed from the river far below the high water mark ; this decision comes as an assault upon vested rights, and as a depriving of the plaintiff in error of property without due process of law, and without compensation.

Mobile river is not a tidal river in the sense meant by " tide " in the English decisions. Our law comes from England, where all rivers are small, and such things as high and low water due to winds and inundations are unknown. The only high and low water known to the English law is the high and low water due to the influence of the moon and sun, and which have all the regularity and precision as to time and height resultant from influences as regular and as measurable as clockwork, viz : The attraction of the sun and moon.

" The word " tide " is used to indicate the periodic rising and falling of oceanic and other large bodies of water, due mainly to the attraction of the moon and sun." " The velocity and direction of tidal currents are much modified by extremely local causes, while the times and heights of the tide remain nearly constant over considerable area ".

Tide Tables, 1901, U. S. Coast & Geodetic Survey, page 13.

"We can only define a tide by reference to the causes which produce it. A tide then is a rise and fall of the water of the sea produced by *the attraction of the sun and moon.*"

23 Ency. Brittanica (9th Ed.), 353.

"Mobile Bay is a *lagoon like estuary, cut off* from the Gulf of Mexico by the narrow sandy isthmus of Mobile Point and the chain of sandy islets on the south. It is, with the exception of a deep pocket in the southern end called the 'Lower Fleet', *extremely shallow*". * * * "The rise and fall of the *tide is small* and the *tidal currents feeble*". (Report of Commissioners on the most desirable locations for Navy Yards and Docks on the Coast of the Gulf of Mexico under the Act of Congress, Sept. 7, 1888, pp. 23, 24).

"The tides of the ports in the Gulf of Mexico, west of Cape St. George (Apalachicola Bay) ebb and flow as a rule but *once* in twenty-four hours". "The *rise* and *fall* at all these ports *are small*". (Report, Coast Survey, 1860, p. 132).

"The rise and fall at Fort Morgan, Mobile Bay, Alabama, is, mean, 1 foot; at moon's greatest declination, 1 5/10 foot; at moon's least declination, 4/10 foot."

"The rise and fall being so small, the *times* and *heights* are both much influenced by the *winds*, and are thus rendered *irregular*". (*Id.* page 158.)

"The stand at high and low water is comparatively short, *seldom exceeding an hour*". (Report, Coast Survey, 1861, p. 125).

Tuomey, Geologist to the State, says (2nd Biennial Report, Geology of Alabama, pp. 151, 152):

"About 30 miles, in a straight line, *above* Mobile, the Tombigby and Alabama Rivers meet, and here the *delta* of Mobile Bay commences. The moment the velocity of the stream is checked the deposition of sedimentary matter begins, a *long low tongue of land* is formed, which divides the combined waters into the Mobile and Tombigby rivers, which after meandering through the channels of the delta, are again subdivided into the Spanish and Apalacha rivers. The delta terminates a *few miles below Mobile.*"

"The great volume of fresh water flowing into the bay and the *very narrow* entrance, prevent the water from becoming even *brackish* at Mobile till late in the season, when the *rivers become low*".

Owing to the physical conditions above described, it results that when the wind blows from the north, the water is low in Mobile

river, because the waters of the bay are blown out of it; when the wind is from the south, the waters of Mobile river are high at Mobile, because the waters of the bay are backed up against the river. When vessels going down the bay ground during the north wind, they have to wait for release, not upon the tide, but a change of wind. In general, the stage of water in Mobile river depends upon rain and drouth in the upper country, and upon local winds, and upon nothing else.

Plaintiff in error refers to those things, because it is said by this Court, that "Courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction."

U. S. v. Rio Grande Immigration Co., 174 U. S., 697.

In Peyroux v. Howard, 7 Pet., 324, this Court held, that it was "authorized judicially to notice the situation of New Orleans for the purpose of determining whether the tide ebbs and flows as high up the river as that place".

It is said by this Court, that "the term high water when applied to the sea, or to a river where the tide ebbs and flows, has a *definite meaning*. The line is marked by the *periodical flow* of the tide, excluding the *advance* of waters above this line in the one case by winds and storms, and in the other by freshets or floods". "But in respect to fresh water rivers the term is altogether indefinite and the line rendered uncertain". "It may mean any stage of water above its ordinary height and the line will fluctuate with every varying freshet or flood that may happen".

Howard v. Ingersoll, 13 How. U. S., 423, 424.

The river at Mobile is a *fresh water* river, as much so as at Demopolis, except as above shown, for a short period it is brackish, not salt. "A fresh water stream is *prima facie* a private stream". Walker v. Allen, 72 Ala., 456 (an authority cited by Mr. Smith in his brief at p. 13).

The rule of ownership laid down in Webb v. Demopolis applies there as well as at Demopolis, and as well as at Chickasabogue Creek, four and one-half miles above Mobile.

Recurring to the leading case in Alabama of Bullock v. Wilson, 2 Port., it is clear that the court in that case wiped out the distinction in Alabama between tidal and non-tidal river, salt or fresh water, and instead of permitting the owner of land bordering on a river to own to the thread of the stream, in cases in which the

stream is a fresh water river, they apply to all Alabama rivers the common law rule of navigable waters, as expounded by Chief Justice PARSONS, in Storer v. Freeman, 6 Mass., 438, 439, who said, "but if his land was bounded by the *sea, or an arm of the sea*, where the tide ebbed and flowed, he could not by such boundary, hold any land *below the ordinary low* water mark, for all the land *below* belonged of common right to the king." (2 Port., 448).

This rule as to the line of state proprietorship was recognized by this Court in Smith v. Maryland, where it is said: "Whatever soil *below low-water* is the subject of exclusive property and ownership, belongs to the state on whose maritime border, and within whose territory it lies, subject to any lawful grants of that soil by that state, or the sovereign power which governed its territory before the declaration of independence."

18 How., 74.

In the case of Pollard's Lessees vs. Hagan, 3 How., 212, this Court rendered a decision directly, or in effect, overruling previous decisions of this Court, with the result, as stated by Justice CATRON in the dissenting opinion, of stripping all private owners of a very large portion of the second city on the Gulf of Mexico in wealth and population, of all title. He said: "On this latter point my brethren and I fully agree".

3 How., page 233.

In that case the Court assume that Mobile was upon the sea, and applied to it the doctrine of the ebb and flow of tide upon the seashore, or arm of the sea. In fact, the river front of the city of Mobile was simply swamp and overflowed lands, not sea-shore lands. As we have seen, Mobile River is not a tidal river, and if that case were to be decided to-day, we submit that the principles laid down by this Court in the case of San Francisco v. Le Roy, 138 U. S., page 656, would have led it to an entirely different result. In that case the Court, by Justice FIELD, said: "All the marsh lands, so called, which the State of California ever owned, were granted to her by the act of Congress of September 28, 1850, known as the Swamp-land Act, by which the swamp and overflowed lands within the limits of certain States, thereby rendered unfit for cultivation, were granted to the States to enable them to construct the necessary levees and drains to reclaim them. 9 Stat. c. 84, p. 519. The interest of the pueblo in the lands within its limits goes

back to the acquisition of the country, and precedes the passage of that act of Congress. And that act was never intended to apply to lands held by the United States charged with any equitable claims of others, which they were bound by treaty to protect. *As to tide-lands, although it may be stated as a general principle—and it was so held in Weber vs. Board of Harbor Commissioners, 18 Wall., 57, 65,—that the titles acquired by the United States to lands in California under tide-waters, from Mexico, were held in trust for the future State, so that their ownership and right of disposition passed to it upon its admission into the Union, that doctrine cannot apply to such lands as had been previously granted to other parties by the former government, or subjected to trusts which would require their disposition in some other way.* When the United States acquired California it was with the duty to protect all the rights and interests which were held by the pueblo of San Francisco under Mexico. The property rights of pueblos equally with those of individuals were entitled to protection, and provision was made by Congress in its legislation for their investigation and confirmation. Townsend v. Greeley, 5 Wall. 326, 337. The duty of the government and its power in the execution of its treaty obligations to protect the claims of all persons, natural and artificial, and of course of the city of San Francisco as successor to the pueblo, were superior to any subsequently acquired rights or claims of the State of California, or of individuals. The confirmation of the claim of the city necessarily took effect upon its title as it existed upon the acquisition of the country. In confirming it the United States through its tribunals recognized the validity of that title at the date of the treaty—at least, recognized the validity of the claim to the title as then existing, and in the execution of its treaty obligations no one could step in between the government of the United States and the city seeking their enforcement. *It is a matter of doubt whether there were any lands within the limits of the pueblo,* as defined and *established by the Land Department, that could be considered tidelands, which, independently of the pueblo, would vest in the State. The lands which passed to the State upon her admission to the Union were not those which were affected occasionally by the tide, but only those over which tide-water flowed so continuously as to prevent their use and occupation.* TO RENDER LANDS TIDE-LANDS, WHICH THE STATE BY VIRTUE OF HER SOVEREIGNTY COULD CLAIM, THERE MUST HAVE BEEN SUCH CONTINUITY OF THE FLOW OF TIDE-WATER OVER THEM, OR SUCH REGULARITY OF THE FLOW

WITHIN EVERY TWENTY-FOUR HOURS, AS TO RENDER THEM UNFIT FOR CULTIVATION, THE GROWTH OF GRASSES, OR OTHER USES TO WHICH UP-LAND IS APPLIED.

138 U. S., pp. 670, 671, 672.

The views of this Court respecting what constitutes the test of "tide lands", as expressed above by Mr. Justice FIELD, are only confirmatory of the doctrine enunciated by Mr. Justice WOODBURY in his dissenting opinion in the case of Waring v. Clarke, 5 How., 441. The fact illustrates the growth of the views of this Court respecting what constitutes "tide lands" just as the case of the Genessee Chief, 12 How., 443, illustrates the growth of views respecting what waters include admiralty jurisdiction.

Judge WOODBURY says: "The first doubt as to the jurisdiction in admiralty over the present case is thus sustained, but, being overruled by a majority of the Court, I proceed briefly to examine the next objection. It is one founded in fact. It denies that the tide did in truth ebb and flow at Bayou Goula, the place of this collision, in ordinary times.

There is no pretence that the water there is salt, or comes back from the ocean, or that the tide there sets upward in a current, or ever did, in any stage of the water in the Mississippi. *Yet this is the ordinary idea of the ebb and flow of the tide.* I concede, however, that it has been settled by adjudged cases, that the tide is considered in law to ebb and flow in any place where it affects the water daily and regularly, by making it higher or lower in consequence of its pulsations, though no current back be caused by it. Rex v. Smith, 2 Doug. 441; The Planter, 7 Peters, 343; Hooker v. Cummings, 20 Johns. 98; Angell on Tide Waters, 637. Yet this of course must be a *visible, distinct rise and fall, and one daily caused by the tides, by being regular, periodical, and corresponding with their movements.*" * * *

"In the next place, several witnesses testify as to their observations in respect to the tides, and confirm what might be expected from these collateral facts. The most scientific among them took frequent observations for two years, at or nigh Jefferson College, thirty-seven miles nearer the sea than the place of this collision, to ascertain this very fact, and testifies *that no regular daily influence is felt there from the tides. Oscillations may occur, but not regularly, nor as tides.* They happen in that way even near the foot of the Falls of Niagara, but of course are produced by causes entirely dis-

connected from the tides of the ocean. So they happen, from other causes, on most of our interior lakes."

"Sometimes continued winds in one direction make a great difference in the rise of the water at different places; and sometimes, the emptying in near of large tributary streams, changeable in their size at different seasons. Both of these are testified to occur in the Mississippi in its lower parts. At high water, which prevails over half the year, from rains and the dissolving of snow, it also deserves notice, that the fall of the river towards the ocean is near one and two-thirds of an inch per mile; and the difference between high and low water mark near Bayou Goula is also, as before noticed, from thirty to thirty-three feet."

"From all this it is easy to see, that, during more than half the year, *it is hardly possible that a regular tide from the ocean should be felt there*, though it is admitted that, in conflict with this, some witnesses testify to what they consider such tides there, and indeed as high up as Bayou Sarah. But their evidence is insufficient to overcome, in my mind, the force of the other facts and testimony on this subject."

Waring v. Clarke, 5 How. U. S., pp. 496, 497 and 498.

It is clear that this Court has adopted the doctrine of Judge WOODBURY that the test of a "tide" such as the law recognizes is, a daily, regular, rise and fall of the water, such as can be predicted with certainty.

None of these conditions exist in Mobile river, at the City of Mobile, as was before above demonstrated.

Applying this test of what constitutes tide-land, to the land the subject of this controversy, and to the entire front of the City of Mobile, there is no such tide-land within the limits of the city of Mobile. The evidence of Toumey, State Geologist, the reports of the Coast Survey, and the Historian Hamilton show that no such lands as "tide-lands" ever existed within the limits of the city of Mobile under any of its charters.

They show very clearly that these lands were of the character natural to all great rivers of the West and Southwest, viz. swamp and overflowed lands; but at the period of time when the decision in 3 How. was rendered this classification of lands had not yet been established by the legislative department and was unknown to the judicial department.

The State itself construed the law of riparian ownership along

Mobile river, within the limits of the city of Mobile, to be as laid down in Bullock v. Wilson, 2 Port., and Webb v. Demopolis, 95 Ala., by a series of acts antedating the act of January 31, 1867, long enough to have established the doctrines of those cases as applicable to the river front of the city of Mobile as a rule of property, beyond assault of legislation, and protected by the Constitution of the State of Alabama and of the United States.

In 1854, the Legislature passed the act of February 16th, 1854, Acts 1853–4, page 476, entitled "An Act to authorize the corporate authorities of the city of Mobile to regulate wharves and wharfage in said city.

Section 1st. of said Act is as follows: "Sec. 1. Be it enacted, &c., that in order to change the present system of wharfage in the city of Mobile, and to substitute dockage charges on vessels in lieu of charges on produce and merchandise, the Mayor, &c., of the city of Mobile shall have power and authority to obtain, *by contract*, the property in, or the control of, the wharves and wharf property in the city of Mobile, so far as the same may be *practicable*, &c".

In 1860, the Legislature inaugurated legislation for the Improvement of the Bay and Harbor of Mobile.

The first act was approved 21st. February, 1860.—Acts Ala., 1859-60, p. 35.

(1) The 3d. section confers upon said Board power and authority to cause a channel, at least three hundred feet wide, to be opened and kept open from the place of anchorage in the bay of Mobile, known as the lower anchorage to the city of Mobile.

(2) The 9th. section of the act establishes a Board, and by it "Said Board is authorized to make such improvements in Mobile River in *front* of the city of Mobile, and as *far up* as the head of Spanish River, as to them may seem necessary to the commerce of said city, *not inconsistent with private rights.*"

(3) Section 13 of that act authorizes the city to build wharves in *front* of the *foot* of the streets, &c.

It requires the engineer to see that the excavations are deposited on some point or points to the *westward* of the *western line* of the channel to be dug. It makes it the duty of the Harbor Commissioners to make arrangements with the *owner* or *claimant* of *riparian lands* that may be suitable for the deposit of said excava-

tions, to *convey* the same to the city of Mobile for the purpos aforesaid. In the event the *owners* or *claimants* of riparian lanc refuse to convey the same to the City, it provides the mode of co demming the same by a jury of inquest. The following proviso embodied in this section: "Provided, however, that nothing in th act shall be so construed as to abridge the right of the State Alabama, to *abate* any wharves or wharf rights in said city shoul they become public nuisance".

Sec. 60 of the City charter of 2d. February, 1866, (See Ac 1865–6, pages 223–4), referred to in the act of 1867, enacted as fo lows; viz.: "Section 60—Be it further enacted, that in order t carry out the system of wharfage in the City of Mobile, herein pr vided for, &c. &c., the Mayor, &c. of the City of Mobile, shall hav power and authority to obtain by *contract* or *purchase*, the propert in or the control of the wharves and wharf property of the City Mobile, *so far as the same may be practicable*" &c., &c.

And in 1868, December 8th, (see Acts 1868, p. 394), the act wa passed entitled "An act to carry into effect paragraph 26, art. 1, the Constitution of Alabama, as follows, viz:

"Sec. 1. Be it enacted by the General Assembly of Alabam that *riparian owners*, upon the navigable and *other* waters this State, who maintain in good order for public convenienc erections and ferries on the banks *or shores* of said water shall be entitled to charge usual and reasonable rates fo the use thereof, or such rates as are prescribed in the several act heretofore passed, authorizing such erections or ferries, or *agree upon* by said *owners* with the corporate authorities of any city, tow or county, in which they are situated, Provided, no erection structure, or ferry, of any kind, shall be permitted injuriously t affect the rights of navigation in said waters", now § 2514, Cod 1896.

The "bank" of a river is defined in the Encyclopædia of Law as "that space of rising ground above *low-water mark*, which i usually covered by ordinary high water."

3 Ency. Law (2 Ed.), page 784.

And the same authority defines the "shore" as "that space o land on the borders of the sea which is alternately covered and lef dry by the rising and falling of the tide; or, in other words, that *space between high and low water mark*."

22 Ency. Law, (1 Ed.), page 778.

The Supreme Court of Alabama has also defined these words in the very elaborately considered case of Howard v. Ingersoll, 17 Ala., page 780, which was also before this Court and reported in 13 How., 381. This cause originated in 1845, and the opinion was rendered at the January Term, 1850, of the Supreme Court of Alabama. In this case Chief Justice DARGAN cites with approval the case of Morgan v. Livingston, *et al.*, 6 Martin La. Rep. 19, saying: "Judge MARTIN defined the bank of a river thus: 'it is that space which the water covers, when the river is highest at any season of the year'; of course he must have meant that space upon the rising ground above low water, but covered by high water, for he then proceeds to say that the river consists of three things, the water, the bed, and the banks, and he could not have intended to include in the definition of the term bank, the bed of the river. The bank of a river may be said to be that space of rising ground *above low water mark*, which is usually covered by ordinary high water. We cannot conceive of any other definition more accurate than this; for the rising ground above low water cannot with any propriety be said to be the bed of the river, and therefore it must be the bank". Page 789.

Further on the Chief Justice says: "I do not think it necessary to examine the numerous decisions, with which our books abound, and to many of which we have been referred, for they are in reference to the rights of individual owners of lands adjacent to the river. It may, however, be safely said, that when a private grant is bounded by the bank or a running stream, in which the tide does not ebb and flow, no well considered case can be found that limits the grant short of low water mark, unless there be other words or expressions used in the deed, showing that the parties did not intend that the grant should extend to low water mark. In the case of Child v. Starr, 4 Hill, 369, Chancellor Walworth said, 'the shore of tide water is that portion of land alternately covered by water and left bare by the flux and reflux of the tide. Properly speaking, therefore, a river, in which the tide does not ebb and flow, has no shore; it has *ripam*, but not *littus*. The term shores, however, when applied to such a river, means the river's banks, *above low water mark*, or rather those portions of the banks of the river which touch the margin or edges of the water of the stream. A grant, therefore, that is bounded by the shore of a fresh water river, conveys the land to the water's edge, *at low water!*" Pages 791, 792.

This case is cited by the Alabama Court with approval in the

case of Williams v. Glover, which originated in September, 1876, and was decided at the December Term, 1880, wherein STONE, Judge, afterwards Chief Justice, says: "The ownership of plaintiff extends to the margin of the water, at ordinary stage, and hence embraces the land between high and low water marks.—Bullock v. Wilson, 2 Por. 436; Mayor v. Eslava, 9 Por. 577; Howard v. Ingersoll, 17 Ala. 780, 791", etc.

66 Ala., 189–193.

The attention of the Court is also called to the act "To Provide for the Improvement of the River, Bay & Harbor of Mobile, Approved Feb. 16, 1867 (Acts Ala. 1866–67, p. 507).

The 4th. section of said Act is as follows, viz:

"SEC. 4. *Be it further enacted*, That in addition to the foregoing powers, the said commissioners are vested with the authority to *purchase* and *condemn lands*, according to the provision of section thirteen of an act, for the improvement of the bay and harbor of Mobile, approved February 21st, 1860; and to take and receive all moneys, papers, books, records and surveys, and all property pertaining to said commissioners, in said act, and the city of Mobile, shall be vested with the title of all lands *made by the deposits of all excavations in the progress of this work* as provided for in said act, and the commissioners designated in this act, and all officers, clerks and employees, shall be subjected to, and be held liable to the duties, penalties and punishments provided for in the fifteenth section of the said act".

This Act was passed by the same Legislature, which passed the other act within a short time after it, and clearly shows that the Legislature did not mean to deny or to impair riparian rights of owners of land along Mobile River in front of the City of Mobile. It is a clear legislative expression of meaning, of the act of January 31, 1867.

There is another act of the General Assembly of Alabama subsequent in date to the said Act of January 31, 1867, which distinctly establishes the riparian rights of owners of lands fronting on Mobile bay and river, which the Supreme Court disregarded in this case.

On February 28, 1872, the said Assembly enacted, "That from and after the passage of this act all owners of lands fronting on any of the bays, rivers, creeks, havens, bayous or creeks within this State, shall be and they are hereby granted the right to plant oyster

beds and gather the oysters therefrom, to the *channel* of said bay, river, creek, haven, bayou or creek ; *Provided*, Such channel be not more than six hundred yards from the shore ; *Provided further*, That nothing shall be done to impede or obstruct the navigation of said bay, river, creek, haven, bayou or creek, or to in anywise impair the riparian rights of the State, or its title to the same as overflowed lands ; but that upon the assertion of the rights of the State the owner of said oysters shall have the right to remove and take the oysters therefrom."

This law forms parts of the Codes of 1886, as section 1385, and of the Code of 1896 as section 3155. This court judicially knows that there is only one bay in Alabama, viz: the bay of Mobile.

The law above cited is certainly inconsistent with a decision excluding absolutely the owner of land, admitted to front on Mobile bay or river, from the use of its front, as does the judgment appealed from in this case. The judgment certainly deprives the plaintiff in error of this positive franchise, without compensation. The right to plant oysters is a right of property.

McCready v. Virginia, 94 U. S., 391.

No court ought, unless the terms of an act render it unavoidable, to give a construction to it which involves a violation however unintentional, of the Constitution.

Parsons v. Bedford, 3 Pet., 448, 449.

The term "property" as applied to land comprehends every species of "title" inchoate or complete.

Souland v. United States, 4 Pet., 511,

referring to the Treaty by which Louisiana was acquired by the United States.

2.

The judgment arbitrarily ascertains boundaries of lands. Boundary question is always matter for determination by the *jury*, according to evidence, not of the court.

Barclay v. Howell's Lessee, 6 Pet., 509-10.

The map admitted in evidence (Record p. 72) as exhibit "**H**", shown on page 86 of the record, shows nothing at the points indicated in the complaint as the west boundary of the lands sued for

to show that they are under the river. On the contrary the point marked 1156[1] on the south line of the lot marked "John Hogan" is even *further back* westwardly from the river than the line marked "High Tide", "Drift Wood line", about twenty feet.

For the the court to take this question of boundary from the jury, and to arbitrarily decide that all the land east of the point "1156[1]" is under the high water mark, deprived the plaintiff in error of its property without due process of law, and violated the 14th. amendment to the Constitution of the United States.

In expounding this amendment this Court say: "The prohibitions of the Fourteenth Amendment refer to *all the instrumentalities of the State*, to its legislative, *executive* and *judicial authorities*, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the State, "violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State".

Chicago, Burlington & Q. Rd. v. Chicago, 166 U. S., p. 226.

The court say further: "The prohibitions of the Fourteenth Amendment have reference to actions of the political body denominated a State by *whatever instrument* or in *whatever words* that action may be taken. A state acts by its legislature, its executive and its judicial authorities. It can act in no other way".

"But the Constitutional Amendment was ordained for a purpose. It was to secure equal rights to all persons".

Ex parte Virginia, 100 U. S., p. 347.

This Court say further: "Due process of law and the equal protection of the laws are secured *if the laws operate on all alike*, and do not subject the individual to an *arbitrary exercise of the powers of government.*"

Duncan v. Missouri, 152 U. S., p. 382.

The court say further: "Due process is so secured by laws operating on *all alike*, and not subjecting the individual to the arbitrary exercise of the powers of government, unsustained by the established principles of private right and distributive justice".

Caldwell v. Texas, 137 U. S., p. 697.

The court say further : " The great purpose of the requirement (Due process of law) *is to exclude everything* that is arbitrary and capricious in legislation affecting the rights of the citizen."

Dent v. West Virginia, 129 U. S., p. 124.

The court say further, that equal protection of the law is " Whenever the law *operates alike* on *all* persons and property *similarly situated* ".

Walston v. Nevin, 128 U. S., p. 578.

In order that the court may understand the map in the record, counsel states to the court that the two parcels of land comprising the property of plaintiff in error are those marked respectively " John Hogan " and " Emanuel Est."

The protection of the 14th amendment applies to all the instrumentalities of the State.

Blake v. McClung, 172 U. S., 260.

And it is said in Chicago &c. R. R. Co. v. Chicago, 166 U. S., 235 : " In determining what is due process of law regard must be had to *substance*, not to *form* ".

" A judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument."

166 U. S., page 241.

It is further said in that case : " The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation ".

166 U. S., pp. 236, 237.

A corporation is a person within the meaning of the Fourteenth Amendment.

Santa Clara Co. v. Pacific R. R. Co., 118 U. S., 396 ;
Smyth v. Ames, 169 U. S., 522 ;
Blake v. McClung, 172 U. S., 259.

This court does not follow the State Supreme Courts. When the question involved in a writ of error is whether or not the Fourteenth Amendment is violated; this Court refuses to follow the construction given the local act by the Supreme Court of the State. In the case of Yick Wo v. Hopkins, 118 U. S., 356, wherein this Court say: "We are constrained consequently at the outset to differ from the Supreme Court of California upon the real meaning of the ordinances in question. *We are not able to concur in that interpretation of the power conferred upon the supervisors*". (Page 366.)

"This *erroneous view of the ordinances in question led the Supreme Court of California into the further error* of holding that they were justified by the decisions of this court in the cases of Barbier v. Connolly, 113 U. S., 27; and Soon Hing v. Cowley, 113 U. S., 703". (Page 367.)

This Court follows the decisions of the highest court of a state, in construing the constitution and laws of the State, *unless* they conflict with or impair the efficacy of some principle of the Federal Constitution or of a Federal Statute, or a rule of commercial or general law".

Norton v. Shelby Co., 118 U. S., 425, 439.

In the case of the Long Island Water Supply Co. v. Brooklyn, 166 U. S., 685, the construction put upon a statute of New York by its Court of Appeals was assailed in argument, and the Court say: "These conclusions of the Court of Appeals are vigorously challenged in the argument, but *we are of opinion they are correct*". (Page 696.)

This Court did not say it had nothing to do with the correctness or incorrectness of the State court's construction of the State law, and would have to accept it, whatever it might be. It passed judgment upon the State Court's conclusions and concurred with them. It might have non concurred with them.

In Board of Liquidation v. Louisiana, 179 U. S., 622, this Court, whilst affirming the State Supreme Court, say: "When the jurisdiction of this Court is involved because of the asserted impairment of contract rights, arising from the effect given to subsequent legislation, it is our duty to exercise an independent judgment as to the nature and scope of the contract".

179 U. S., p. 638.

And in New Jersey v. Wilson, 8 Cranch, 164, it is said that a right vested is a contract executed, and a statute impairing a vested right impairs the obligations of a contract.

It is true that the Supreme Court of Alabama did not in its opinion expressly refer to the Constitution of the United States. (Trans. p. 106.) But that circumstance is not conclusive against the jurisdiction of this court to reexamine the final judgment of the State Court.

The judgment of affirmance necessarily denied the Federal rights thus specifically set up by the plaintiff in error; for that judgment could not have been rendered without deciding adversely to such claims of right.

Chicago, Burlington &c R'd. v. Chicago, 166 U. S., 231-2.

10th, 18th-36th incl., 38th-40th incl. 53d Specifications of Error.

STATUTE OF LIMITATION.

The Statute of Limitations applicable to this case has been in force since the adoption of the Code of Alabama of 1852.

	20 yrs.	10 yrs.
Code 1852, Secs.	2475;	2476.
Code 1867, Secs.	2899;	2900.
Code 1876, Secs.	3224;	3225.
Code 1886, Secs.	2613;	2614.
Code 1896, Secs.	2794;	2795.

They have been construed in the following cases:

State v. Conner, 69 Ala., 212.
Wyatt v. Tisdale, 97 Ala., 596.

Conner's case is that of a statutory real action in ejectment brought by the State for the use of a township to recover a quarter of a sixteenth section, being public school lands. It was commenced November 30, 1876. The State asked the trial court to charge the jury: "If the evidence in this case shows to the jury that this action is brought for the recovery of sixteenth section school lands belonging to the township, then the plea of the Statute of Limitations of ten years does not apply in this case." The court refused to give this charge. Judgment was rendered for the defendant and the State appealed.

69 Ala., 214.

The Supreme Court of Alabama say: "The Circuit Court did not err in refusing the charges asked," and affirmed the Circuit Court's judgment.

They say: "The gist of it is, that the defendant and those under whom he claims, have held continuous, adverse, or independent possession for ten years next before the suit was brought."

69 Ala., 217, 218.

Wyatt v. Tisdale, 97 Ala., 594, was also a case of ejectment, brought by Tisdale against Wyatt in December 1890, in the Crenshaw Circuit Court.

The plaintiff introduced a grant made by the State in 1882, and rested.

The defendant introduced the deposition of one Ellison, who testified that one Tisdale made him a deed to the lands sued for in 1864, and that he paid Tisdale the purchase money. This evidence was excluded, and the general charge given for the plaintiff, Tisdale. This judgment was reversed by the Supreme Court of Alabama, in 1892-3.

The Court say: "It will be seen from this statement of the facts that at least from December, 1863, to the time of the commencement of this suit, a period exceeding twenty-five years, the defendant in ejectment, and those from whom by mesne conveyances she derived title, had been continuously and adversely in possession of the land, under color of title, holding and claiming the same in their own right. The continuity of the adverse possession was unbroken during the entire time. It is contended, however, that the statute of limitations does not run against the State, that the maxim '*nullum tempus occurrit rei publicæ*' applies. Such is the law, unless the statute expressly by its terms is made to apply to the State, or unless it is clear from the statute that it was so intended.—Miller v. State, 38 Ala. 600."

"Our statute prescribing the time within which suits must be brought, which has been in force at least since the adoption of the Code of 1852, is as follows: Section 2613. Limitations of twenty years. Within twenty years.

1. Actions at the suit of the State against a citizen thereof for the recovery of real or personal property.

2. Actions by or for the use of any township for the recovery of any sixteenth section or other school lands belonging to the township.

The authority of the legislature to make the statute apply to suits by the State, or for the recovery of sixteenth section lands, is not doubted, and *there is no reason why a different construction should be given to the statute or a different principle applied when the suit is by the State, or one claiming through the State, than that applied to private persons.*"

The Court further say : " If the jury believed the phase of the evidence as we have stated it, the verdict should have been for the defendant ".

97 Ala., pp. 595, 596.

Prior to the Code of Alabama of 1852, the statute of limitations as to entries upon lands was twenty years.

Clay's Digest, 327, sec. 83.

Construing this the Supreme Court of Alabama say : " An uninterrupted adverse possession for twenty years, not only gives a right of possession which cannot be divested by entry, but also *gives a right of entry.* So that if a person who has such a possession is turned out of it, he may lawfully enter and bring an ejectment for its recovery ; upon which he will be entitled to judgment ".

Doe ex. dem. Farmer's Heirs v. Eslava, 11 Ala., 1042, 1043;
Murray v. Hoyle, 92 Ala., 559.

In other words the operation of the statute is the same as a positive grant, by *conferring title* to the land in the adverse holder.

This Court has said : " It is not to be questioned that laws limiting the time of bringing suit, constitute a part of the *lex fori* of every country; they are laws for administering justice; one of the *most sacred* and important of sovereign rights and duties; and a *restriction* which must *materially affect both legislative* and *judicial independence.*"

Hawkins v. Barney's Lessee, 5 Pet., 466.

When possession of land was acquired within the limits of the territory claimed by the United States, by virtue of the treaties of St. Ildefonso and Paris, whilst Spain exercised *actual* dominion over it, under the defense of the statute of limitations, the possession of land will be dated from the period of its *actual occurrence ;* and not from the date of the act of Congress of 1812, abrogating the

Spanish, and extending the laws of the Mississippi Territory over the country, nor from the date of the actual occupation of the territory by the United States, the succeeding year.

Innerarity v. Mims, 1 Ala., 660, decided in 1840.

When the statute of limitations begins to run, it continues to run notwithstanding any intervening disability to sue.

Grice vs. Jones, 1 Stewart, 254.

In our case the evidence offered by the plaintiff in error, but excluded by the Court as immaterial and irrevelant, tended to show that Regist Bernoudy, through whom the plaintiff in error claims, had possession of the Bernoudy Tract in 1792.

The statute had been running 75 years in favor of Bernoudy and his assignees when the act of January 31, 1867, was passed by the General Assembly of Alabama. Hamilton's Colonial Mobile—page 425.

" Grant or title to lands once made by the Legislature is irrevocable".

Tenet v. Taylor, 9 Cranch, 43, cited by STORY, J., in Wilkinson v. Leland, 2 Pet. 657.

It is there said by the Court : " A grant or a title to lands once made by the legislature is irrevocable, and cannot be re-assumed by any subsequent legislative act ; and that a different doctrine is utterly inconsistent with the great and fundamental principle of a republican government and with the right of the citizens to the free enjoyment of their property lawfully acquired.

We know of no case, in which a legislative act to transfer the property of A to B, without his consent, has ever been held a constitutional exercise of legislative power in any State of the Union".

" In Wilkinson v. Leland, 2 Pet., 657, this Court declare that " the fundamental maxims of a free government seem to require that the rights of personal liberty and *private* property should be held sacred. At least, no court of justice in this country would be justified in assuming that the power to violate or disregard them, a power so repugnant to the common principles of justice and civil liberty, lurked under any general expressions of the will of the people."

The importance of these statutes of limitation in the case of the City of Mobile, is attested by CATRON, J., in Pollard v. Hagan, 3

How., 233, decided in 1844, wherein he said, in his dissenting opinion:

"Except the grant to Pollard, the act of 1824 confers the entire title (so far as is known to this Court) of a most valuable portion and a very large portion, of the second city on the Gulf of Mexico, in wealth and population. This act is declared void, in the present case; and the previous decisions of this Court are either directly or in effect, overruled *and the private owners stripped of all title. On this latter point my brethren and I fully agree.*

Can Alabama remedy the evil, and confirm the titles by legislation or patent? I say by patent, because this State, Louisiana, Mississippi and surely Florida, will of necessity, have to adopt some system of giving title, if it is possible to do so, aside from private legislation, as the flowed lands are too extensive and valuable for the latter mode of grant in all instances."

It was subsequent to this opinion that Alabama enacted the law making 20 years' acquiescence on the part of the State a bar to its assertion of any right of entry upon lands adversely held and thus supplied the legislation which perfected all titles on the river front of Mobile.

Independently of statute law, it is settled doctrine that individuals may acquire by prescription against the owner or State, the right to the soil of public waters.

Gould, Waters (3rd Ed.), sec. 37, p. 88.

A "beach" is the shore between high and low water mark.

3 Ency. Law, 2d. Ed., 901.

Title to it can be acquired by adverse possession.

Gould, Waters, (3d. Ed.), sec. 22, p. 49.
Andrew v. Nantasket Beach R. R., 152 Mass., 506.
People v. Canal Appraisers, 33 N. Y., 461, and authorities cited by Gould, Waters, note 3, page 49.

The doctrine of alluvion applies to tide waters.

Gould, Waters, (3d. Ed.), Sec. 155, p. 310.

Notwithstanding the general principle that no time runs against the king, yet a subject may acquire property in the shore by custom or prescription.

Gould, Waters (3d. Ed.), p. 40, n. 5.

And this doctrine is fully recognized in Alabama. In Boulo v. New Orleans R. R. Co. 55 Ala., the place in controversy was a *slip* between two wharves; its western boundary is Commerce Street and on the east it extends into the Mobile river.

55 Ala., 489.

The complainant, Boulo, showed no documentary evidence of title, Chief Justice BRICKELL says, speaking for the Court: "This seems to be conceded by the complainants; but it is noted that they, and those under whom they claim, for more than twenty years, have been in the undisturbed and undisputed possession of the place, under a claim of right. If the fact exist, it is right and just they should be protected in the possession.—Varick v. Corporation of N. Y., 4 John, Ch. 53. The presumptions of the law are in favor of the legality of men's acts; and therefore it attributes a *lawful origin* to long-continued use and enjoyment.—3 Stark, Ev. 1203".

55 Ala., 491.

It was, also, fully recognized by the Supreme Court of Alabama in the case of Farmer's Heirs v. Eslava, 11 Ala., 1028. They say: "But the question arises whether these papers are not admissible for the purpose of showing that Spain asserted a right to the premises in question, or laying a predicate from which it may be presumed that the defendant and those under whom he claims had been in possession of the premises in question for twenty years previous to the institution of this suit, so as to give him a title by prescription. Our predecessors, in Hallett v. Eslava's Heirs, 3 Stew. & P. R., 122, intimated that the evidences of an incomplete claim under Spanish authority should be received for the purpose indicated, though they had not been recorded as the statutes referred to contemplate. It is clear their admission is not inhibited by the letter of the acts of Congress, as they do not deny the validity of the confirmation and patent consequent upon it; but the defence which they intended to aid, concedes to the plaintiff's title the validity which the confirmation and patent can, under the circumstances impart."

11 Ala., 1038, 1039.

The force of Justice CATRON's remark in 1844, cited above, to the effect that private owners (in Mobile) were stript of all title and which he said was the unanimous opinion of the court, and the

effect of the statute of limitations which came into existence by the Code of 1852, is made evident by the history of Mobile, and by comparisons between recent maps of the City and that forming part of the record in this court in the case of Leverich vs. the City of Mobile, before cited (October Term, 1874, No. 2). The history of the City shows that originally Royal Street was the street nearest to the river front parallel to it, and that all but a narrow strip of land of about one hundred and fifty feet eastward has been reclaimed from the river; that this reclaimed land which formerly was under the navigable waters of Mobile River forms the streets called "Water," "Commerce" and "Front" streets, and the levee, and upon which is built the larger and most valuable part of the business section of the City of Mobile.

Hamilton's Colonial Mobile.

On page 134 of that history is shown a map of the City as it was in 1760, and the text shows (pages 135, 137 and 138) that the part marked "quay" is our present Royal Street, now separated from the River by three broad streets and a broader levee, and resultant solid blocks of brick buildings.

Pages 304, 306, 313.

On page 313 it is said "It must be remembered, too, that *not far east of Royal Street was the river bank.*" See, also, Watkins v. Holman, 16 Pet., 25.

1st, 8th, 54th and 58th Specifications of Error.

The action of the Supreme Court of Alabama, violates Section X, Article I, of the Constitution of the United States.

A contract is impaired within the meaning of said section so as to give this Court jurisdiction on a writ of error, to the State Court, When rights acquired under it are impaired by some subsequent statute, which has been upheld or *effect given* to it by the State Court.

Bacon v. Texas, 163 U. S., 216.
Lehigh Water Co v. Easton, 121 U. S., 388.
N. O. Water Works Co. v. Louisiana Sugar Ref. Co., 125 U. S., 18.
Central Land Co. v. Ludley, 159 U. S., 103, 109.

The settled judicial construction of the act of January 31, 1867, and of the statute of limitations of the State of Alabama, so far as rights were acquired thereunder by the plaintiff in error, is as much a part of the statute as the act itself, and the change of decision complained of in this proceeding is the same in its effect on plaintiff in error's rights as a repeal or amendment by legislative enactment.

Douglass v. County of Pike, 101 U. S. 677.
Ohio Life Ins. Co. v. Debult, 16 How., 416.

The action of the Supreme Court of Alabama violates, also, the 14th. amendment to the Constitution of the United States.

Proceedings under the statute of 31st. of January, 1867, which, if taken before the adoption of the said amendment, would not have violated the Constitution, taken after the adoption violate the Constitution if prohibited by the amendment.

Kaukauna Co. v. Green Bay & Canal Co., 142 U. S., 254.

This court has unquestioned jurisdiction to revise the action of the Supreme Court of Alabama, as in this case, authorizing the taking of private property without compensation.

Yesler v. Washington Harbor Line Comm'rs. 146 U. S., 655, *ad fin.*

This Court, also, always examines constitutional questions and is not bound to follow construction of State Courts upon statutes and construction of statutes in the matter of contracts alleged to have been impaired.

McCullough v. Virginia, 172 U. S., 109.
Douglass v. Kentucky, 168 U. S., 488, 4th *h. n.*
Orr v. Gilman, 183 U. S. (22 S. C. R. 215).

In Hoboken v. Penn. R. R. Co., 134 U. S., 656, this court did not follow the Court of Errors and Appeals of New Jersey in its judgment rendered between the same parties, or their privies, because, as this court say: "The grants from the *State* of New Jersey under which the defendants (R. R. Co.) claim, respectively, are a complete bar to the recovery sought against them in these suits. The *effect* of these grants was not considered by the Court of Errors and Appeals, in the case of the Hoboken Land and Improvement Company v. Hoboken, 7 Vroom, 540, and they were not elements in that judgment."

124 U. S., 693, 694. Cited in Mr. Smith's brief, p. 46.

And in the case of the Atchison T. &c. R. R. v. Matthews, 174 U. S., 96, this Court say: "This Court is not concluded by the opinion of the Supreme Court of the State. Yick Wo v. Hopkins, 118 U. S., 356, 366. *It forms its own independent judgment as to the scope and purpose of a statute*, while of course leaning to any interpretation which has been placed upon it by the highest court of a state."

174 U. S. Page 100.

It is said in Hardin v. Jordan, by this Court, that a decision of a State Court, affecting *riparian rights*, which is opposed to the entire course of previous decisions in that State, will be disregarded by this Court.

140 U. S., 371, 384.

And in that case this Court disregarded the decision of the Supreme Court of Illinois in a matter of riparian rights in lands fronting upon a lake. This Court regarded the older decisions as *rules of property*.

41st-51st (inclusive) Specifications of Error.

No compensation is allowed the plaintiff in error for the taking of its property, according to the decision of the Supreme Court of Alabama. On the contrary, the plaintiff in error is mulcted in damages.

It has been said by this Court: "It is within the competency of the legislature to determine when and what property shall be taken for public uses. That question is one of policy over which the Courts have no supervision; but if after determining that certain property shall be taken for public uses the legislature proceeds further, and declares that only a certain price shall be paid for it, then the owner may challenge the validity of that part of the act; may contend that his property is taken without due compensation; and the legislative determination of value does not preclude an investigation in the proper judicial tribunals".

Chicago &c. Ry. Co. v. Tompkins, 176 U. S., p. 173.
Monongahela Nav. Co. v. U. S., 148 U. S., 312, 324, &c.

A fortiori when no compensation whatever is provided for.

Access to navigable waters cannot be taken from riparian owners without compensation, except by the United States when in furtherance of navigation.

Scranton v. Wheeler, 179 U. S., 141.

Due process of law means a *fair* trial in a court of justice, according to the modes of proceeding in such cases.

Merchant v. Pennsylvania R. R. Co., 110 U. S., 387.

And when the parties have been *fully* heard, in the regular course of judicial proceedings.

Central Land Co. v. Laidley, 159 U. S., 112.

In this case, which is a *jury case*, as the record shows, all evidence whatsoever offered upon behalf of plaintiff in error, except the map, was excluded—and judgment rendered for the defendant in error upon no evidence upon its part, except general laws of which the court itself would take judicial notice, and which the jury was bound to construe just as the court instructed them.

3 Brick. Dig. p. 408, secs. 23, 24.

Case v. Mayor of Mobile, 30 Ala., 538.

2d, 3d, 4th and 7th Specifications of Error.

Riparian Rights in Alabama.

It was said in Miller v. Cullum, 4 Alabama, 582, decided in 1843: "But suppose the Spanish concession *in totidem verbis* had recognized the mouth of the branch, as the northeast corner of the tract at the time it was surveyed, would it not be admissible to show, that owing to alluvial deposits and other causes, the locality had been changed, so as by an adherence to it, greatly to increase or diminish the quantity which passed by the grant, or to change the form of the plot?"

In Hagan v. Campbell, 8 Porter, 33, it is said: "Nor can the fact of a road running along the bank of a navigable river, be held to limit a grant having the river for its boundary, so as to exclude its proprietor from riparian rights; and in this case there cannot be the slightest pretense for such an idea. The freehold in the land

over which the road runs, did not continue in the Spanish Government; that was transferred by the grant, while its use only was to be enjoyed by the public (Cortelyou vs. Van Brundt, 2 Johns. R., 351). And the title to all the soil lying between the original tract and the river, having passed by virtue of the grant of 1807, to John Forbes & Co., and of course to his assignees, they immediately became entitled to the right to alluvial formations, in the same manner as other riparian proprietors are, on navigable streams.

But even supposing that the Spanish grant only conveyed the title, to what was known as high-water mark, at the time it was made, the plaintiffs then would have been entitled, as riparian proprietors, to every increase of land by alluvion."

This doctrine is reaffirmed in Hallett v. Hunt, 7 Ala., 882.

In Hagan v. Campbell, 8 Porter, 9, it is said that "Riparian proprietors are entitled to all accessions made, to the lands granted, either by the retreating of the river from its former limits; or by the slow and secret deposit of sand and other substances."

The Court is especially desired to notice that all these cases relate to lands on the river front of Mobile.

See also Boulo v. New Orleans R. R. Co. 55 Ala., 489, before cited, and also Compton v. Hankins, 90 Ala., wherein it is said:

"Riparian owners have claimed and exercised the right to construct wharves and landing places on navigable streams, from the earliest settlement of this country, subject to the limitation, that the public easement or servitude is not impaired. The owner has the same dominion and power to control such landing places as any other private property, and to possess and use the same to the exclusion of the public." (Page 414.)

In the case of Pollard's Lessee v. Files, 2 How. 591, this court did not hesitate to reverse the Supreme Court of Alabama, in a case upon a proposition the *exact converse* of that involved in the present case.

In the Files case the Supreme Court of Alabama held that the plaintiffs, Forbes & Co., could recover as riparian owners, against Pollard. This Court reversed the Alabama Court because, as they say, the Spanish grant to Pollard was good, and that Forbes & Co. had no riparian rights in the land, which was a lot *east* of Water Street, because the lot granted to them was on the *west* of Water Street, and was a *city* lot, and therefor Water Street was its boundary on the east (and not the channel of the river).

2 How. 607 (A. D. 1844).

18th-27th (inclusive), 53d Specifications of Error.

There was error in excluding as immaterial and irrelevant the documentary evidence of title offer by the plaintiff in error.

This Court can look into the title in arriving at the conclusion as to whether the national constitution has been violated or not.

It is said by this Court in Martin v. Hunter's Lessee, 1 Wheat., 357: "The objection urged at the bar is, that this Court cannot inquire into the title, but simply into the correctness of the construction put upon the treaty by the Court of Appeals". 357.

"How, indeed, can it be possible to decide whether a title be within the protection of a treaty until it is ascertained what that title is, and whether it have a legal validity? From the very necessities of the case, there must be a preliminary inquiry into the existence and structure of the title, before the Court can construe the Treaty in reference to that title. If the court below should decide, that the title was bad, and, therefore, not protected by the Treaty, must not this court have a power to decide the title to be good and, therefore, protected by the Treaty?"

P. 358, STORY, J.
Cites Smith v. State of Maryland, 6 Cranch, 286.

"It is equally clear that, the *title* is the primary object to which the attention of the court is called in every such case. The words are, 'and the decision be against *the title*', so set up, not against *the construction of the treaty* contended for by the party setting up the title. And how could it be otherwise? The title may exist, notwithstanding the decision of the state court to the contrary, and in that case the party is entitled to the benefits intended to be secured by the treaty. The decision to his prejudice may have been the result of these very errors, partialities, or defects in state jurisprudence against which the constitution intended to protect the individual."

JOHNSON, J., pp. 369, 379.

In Smith v. Maryland, 6 Cranch, 291, Johnson arguendo says, p. 291: "It is for this Court to decide whether the construction which the Maryland courts have given to their acts of the Assembly, be *consistent* with the true construction of these treaties."

The Court by WASHINGTON J., p. 304, say: "This argument proves nothing more that that the whole difficulty in this case

depends upon that part of it which involves the construction of certain state laws, and that the operation and effect of the treaty, which constitutes the residue of the case, is obvious *so soon as that construction is settled.*"

21st 22d & 53d Specifications of Error.

The court erred in excluding from evidence the Treaty with Spain, of February 22, 1819, and especielly the 8th. Article of said Treaty.

" Under the 8th. Article of the Treaty between the United States and Spain, of February 22, 1819, (8 Stats. at Large, 252), the title to lands which had been granted by the King of Spain was confirmed by force of the instrument itself."

United States v. Perchenian, 7 Peters, 81, 82.

This article does not avoid *surveys* made after 24th January, 1818, to locate grants made before that time, although such grants contained no description of the plan where they were to be located.

United States v. Domingacosta, 1 How., 24.

The volumes of State Papers are evidence to establish a chain of title to land.

Watkins v. Holman, 16 Pet. 55, 56.
Hall v. Doe ex dem. Root, 19 Ala., 386, 388, 391, 396-9.
Cited in Mr. Smith's brief, p. 6*a*.
Stewart v. Trenier, 49 Ala., 492.
Trenier v. Stewart, 55 Ala., 558.
Ballard v. Greit, 3 Ala., 932 (cited in Mr. Smith's brief, p. 17).

5th, 11th, 13th, 14th, 55th, 57th Specifications of error.

In Alabama the courts have never held that the State owned the soil under navigable waters in fee, but only as a trust for the purposes of navigation.

We have before cited Kemp v. Pollard, 3 Ala., 294, where that court say: " What is said by the court of a *property* in the shore passing to the State, upon its admission into the Union, cannot when

fairly interpreted, be understood to mean the *absolute ownership*, but merely the right of *jurisdiction* and *control*".

In confirmation of the doctrine as laid down in 3 Ala., 294, we have ths exposition of the Supreme Court as to the character of the rights that the State of Alabama reserved, upon being admitted into the Union, over the navigable waters, in the case of the city of Mobile v. Eslava, 9 Porter, 577. On page 597 they say: "By the act of Congress of March 1803, 'regulating the grants of land providing for the disposal of lands of the United States south of the State of Tennessee', it is enacted that all navigable rivers within the territory of the United States, south of the State of Tennessee, shall be deemed to be and remain public highways. And all the laws in regard to the establishment of territorial governments by Congress, and the survey and disposal of the public lands, whether of an earlier or later date, contain similar provisions". * *

"In the last proviso of the 6th. section of the act of 1819, 'to enable the people of the Alabama territory to form a Constitution and State government, and for the admission of such state into the Union, on an equal footing with the original states', among the propositions submitted by Congress to the Convention, for their acceptance or rejection, it is declared, that 'all navigable waters within the said state, shall forever remain public highways, free to the citizens of said state, and of the United States, without any tax, duty, impost or toll therefor, imposed by the state'. By the ordinance which makes a part of the Constitution of Alabama, the 'convention for and in behalf of the people inhabiting this State, do accept the propositions offered by the act of congress, under which they are assembled." p. 598.

Page 599: "Without speculating further upon the intention of Congress, to be gathered from its enactments previous to 1819, we think it sufficiently appears from the act of that year, authorizing the formation of a State Constitution, that the United States proposed to relinqish its right to the 'navigable waters' within this state, upon an *agreement* by the convention, that they should 'forever remain *public highways*, free to the citizens of said state, and of the United States, without any tax, duty, impost or toll therefor, imposed by said state'. The proposition for that purpose is thus introduced by congress: 'Sec. 6. That the following be, and the same are hereby offered to the convention of the said territory of Alabama, when formed, for their free acceptance or rejection,

which, if accepted by the convention, shall be obligatory upon the United States'. The convention, we have already shown, accepted all the propositions submitted to it, *and thus perfected the stipulation between the state and federal governments*". p. 599.

These cases decide that, when the State was admitted into the Union, it agreed never to treat the navigable waters of the State as its property, never to claim absolute ownership of them, but merely to assert the right of jurisdiction and control over them.

This agreement is as binding upon the State as any other contract.

Stearns v. Minnesota, 179 U. S., 223, 240, 243, 244, 245, 253.

But if the State has no absolute property in the river at Mobile, and no absolute ownership, it cannot invest the City of Mobile with a title it has not itself. The Act of 1867, if not in violation of the State Constitution, violates the agreement with the United States, and violates the Constitution of the United States, by impairing the obligation of a contract.

In Abbott v. Kennedy, the Alabama Supreme Court say: "The State only claims property in the shore as the *representative* of the *public* for the purposes entirely conservative of the usufruct therein, *never* destructive of it."

"This being the case it would seem necessarily to follow that the sovereign power *can make no disposition of the shore by grant or otherwise* prejudicial to the rights of those for whom it holds it in trust."

Abbott v. Kennedy, 5 Ala., 395.

As before shown in this brief the same doctrine was held by the Alabama Court in the case of Mobile v. Moog, 53 Ala., 561, where the Court construed the act of January 31, 1867, as conferring only a right to regulate the use of the shore, if valid for any purpose whatever.

This doctrine has prevailed in Alabama as a rule of property, therefore, so long as to create settled rights, which cannot now be arbitrarily wrested from the citizen without compensation. The citizen had a right to purchase water fronts in Alabama and to erect wharves thereon and to fill in the low ground approaching such wharves, without which filling the wharves would be useless, relying upon the express declaration of the Supreme Court that the State reserved to itself no other rights over the soil of

navigable waters than those necessary to protect the navigation of such rivers.

The foregoing view of the character of the State's ownership of land under water is in accordance with those expressed by Mr. Justice BRADLEY in Stockton vs. Baltimore & N. Y. R. Co., 32 Fed., 20, cited with approval by this Court in Scranton vs. Wheeler, 179 U. S., 141. Justice BRADLEY says, that the character of the title or ownership by which the State holds the State House is quite different from that by which it holds the land under navigable waters in and around its territory"; (page 19), which is the same as saying the State does not hold land under navigable water in fee.

In Illinois Central R. R. Co. v. Illinois, 146 U. S., 387, this court said that the state's ownership of land under navigable waters is not in fee simple.

146 U. S., 452.

The language of this Court in that case, is: "That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to preemption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the creation of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged land; and, so long as their disposition is made for such purpose, no valid objection can be made to the grants. It is the grants of parcels of land under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged

cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state".

In *Illinois vs. Illinois Central R. R. Co.*, this Court say: "The title to submerged land resting in the state is held in trust in aid of navigation. * * * It does not comport with our sense of duty in the protection of a mere naked title to submerged land to deny a conceded riparian right—conceded, because so conceded by the ultimate tribunal, when that bare legal title is held in trust for the very purpose to which these structures are devoted—viz., the accommodation of the commerce of the lake."

184 U. S. (22 S. C. R., 306).

Judge DAVIES, in People vs. Canal Appraisers, 33 N. Y., 500, pronounces "dangerous" the proposition that the state can vest the fee of a navigable stream in a private owner, assuming that the estate of the state was that *in fee*, as if absolute owner, when it is only a trustee.

And this court say in Pollard vs. Hagan, 3 How., 212. The State's right of sovereignty and jurisdiction over navigable waters are not governed as it prevailed in the colonies before the revolution, but as modified by our own institutions.

And Judge CATRON said in the same case: "Alabama has only political jurisdiction over the thing, and it must be admitted that subject cannot be the subject of a private grant."

3 How. 235.

It was said in the leading case in Massachusetts of Commonwealth v. Alger, "Principles of usage and adoption relating to shore modify the common law".

7 Cush, 67, 74, 76, 79.

In this case the laws introduced in evidence by the defendant in error show that the effect of this judgment of the Supreme Court of Alabama is to confirm grants of the soil under the navigable waters of this State to private individuals, and to confer estates in fee in such soil upon such individuals, with right of exclusive, actual possession. (Trans. p. 45).

The second section of the act of February 18, 1895, so introduced in evidence enacts: "Sec. 2. *Be it further enacted*, That the said city of Mobile be, and is hereby authorized and empowered to contract and arrange with such person, or

persons, as it may think proper, upon such terms as may seem best to it, for the ascertainment, location, and recovery of any part, or the whole, of such property, and the rights hereby vested in it, and may, if it thinks proper to do so, *convey to such person, or persons, an interest in said property, and rights, as compensation* for his, or their, services in such matters."

Pamph. Acts Ala. 1894–5, p. 816.

And the corresponding section of the same act of December 5, 1896, enacts:

SECTION 2. *Be it further enacted*, That the said city of Mobile be, and is hereby authorized and empowered to contract and arrange with such person or persons, or as it may think proper upon such terms as may seem best to it, for the ascertainment, location and recovery of any part or the whole, of such property and the rights hereby vested in it and may, if it thinks proper to do so, *convey to such person or persons an interest in said property*, and rights, *as compensation* for his or their services in such matters."

Pamph. Acts Ala. 1896–7, p. 50.

Both of said sections authorize the City to grant the soil under navigable waters of the State to lawyers as payment of their fees.

That such is the view of the learned counsel for defendant in error is shown by his remarks on pages 35 and 36 of his brief, commenting upon the opinion of the United States District Judge, TOULMIN, as reported in 110 Fed., 186, where he says: "The learned judge wholly ignores the second act of December 5, 1896, which vested the absolute and unqualified title in the City. (See record, page 48.)"

It is forcibly said in a leading New Jersey case: "The sovereign power itself, therefore, cannot consistently with the law of nature, and the constitution of a well ordered society, made a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people".

Arnold v. Mundy, 1 Halsted, N. J., 1, 10 Am. Dec. 356.

It was further said by this court in the case of Illinois Cent. R. R. Co. v. Illinois: "But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor

or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interest of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the state of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers and exercise them in a more direct manner, and one more comfortable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters they cannot be placed entirely beyond the direction and control of the state."

146 U. S., pp. 452, 453.

The mischiefs which arise from rulings like this of the Alabama Supreme Court complained of are clearly shown by Justice MITCHELL, in Lamprey v. State, 52 Minn., 181, 197, cited in Murphy v. Kirwan, 103 Fed. Rep., 104, as follows:

"The incalculable mischiefs that would follow if the riparian owner is liable to be cut off from access to the water, and another owner sandwiched in between him and it, whenever the water line had been changed by accretions and relictions, are self-evident, and have frequently been animadverted on by the courts. These considerations apply to riparian ownership on lakes as well as streams. * * * * * * * * * * * * * * * The owners of lands bordering on them have often bought with reference to access to the water, which usually constitutes an important element in the value and desirability of the land. If the rule contended for by the appellants is to prevail, it would simply open the door for prowling speculators to step in and acquire title from the state to any relictions produced in the course of time by the recession of the water, and thus deprive the owner of the original shore estate of all riparian rights, including that of access to the water. The *endless litigation over the location of the original water lines*, and the *grievous practical injustice to the owners of the original riparian estate* that would follow, would of themselves be a sufficient reason for refusing to adopt any such doctrine."

Even if the State of Alabama had the fee of the soil under its navigable waters, the same as an individual citizen, yet that fact would not vest it with such an estate as would give it the right to bring suit in ejectment for it, against the riparian owner, or any other person having right to use the waters for purposes of commerce and navigation.

It has been held that if the owner of a tract of land dedicated it to the public use for the convenience and accommodation of the inhabitants of a city, the owner or his representative cannot maintain an action of ejectment to recover possession of it.

To constitute such dedication the legal title need not pass from its owner, nor is it necessary that any grantee of the use should be in existence.

> Cincinnati v. Lessee of White, 6 Peters, 431. Examined and affirmed in New Orleans v. United States, 10 Pet., 713.

"Dedications of land for public purposes have frequently come under the consideration of this Court; and the objections which have generally been raised against their validity have been the want of a grantee competent to take the title; *applying to them the rule which prevails in private grants*, that there must be a grantee as well as a grantor.

But *that is not the light in which this Court has considered such dedications for public use*".

"It was admitted at the bar, that dedications of land for charitable and religious purposes, and for *public highways*, were valid without any grantee to whom the fee could be conveyed" *Id*, 435.

Citing &c.

Beatty v. Kentz, 2 Pet. 566;
Town of Pawlet v. Clark, 9 Cranch. 292.
M'Connell v. Lexington, 12 Wheat. 582;
Jarvis v. Dean, 3 Bing. 447.

"But it is contended that the lessor of the plaintiff has shown the legal title to the premises in question in himself, which is enough to entitle him to recover at law; and that the defendants' remedy, if any they have, is in a court of equity. And such was substantially the opinion of the circuit court, in the fourth instruction asked by the plaintiff. * * * * * * * * * * * *"

"We do not accede to this doctrine. For should it be admitted, that the mere naked fee was in the lessor of the plaintiff, it by no means follows that he is entitled to recover possession of the common in an action of ejectment."

"This is a possessory action, and the plaintiff, to entitle himself to recover, must have *the right of possession*: and whatever takes away this right of possession, will deprive him of the remedy by ejectment. Adams's Eject. 32. Starkie, part 4, 506, 507."

"This is the rule laid down by Lord MANSFIELD in Atkins v. Horde, 1 Burr. 119. An ejectment, says he, is a possessory remedy, and only competent where the lessor of the plaintiff may enter; and every plaintiff in ejectment must show a right of possession as well as of property. And in the case of Doe v. Staple, 2 Durn. and East, 684, it was held, that although an outstanding satisfied term may be presumed to be surrendered, yet an unsatisfied term, raised for the purpose of securing an annuity, cannot, during the life of the annuitant; and may be set up as a bar to the heir at law, even though he claim only subject to the charge. Thereby clearly showing the plaintiff must have, not only the legal title,

but a clear present right to the possession of the premises; or he cannot recover in an action of ejectment. And in the case of Doe v. Jackson, 2 Dowl. and Ryl., 523, BAILEY, Justice, says, 'an action of ejectment, which from first to last is a fictitious remedy, is founded on the principle that the tenant in possession is a wrong-doer; and unless he is so at the time the action is brought, the plaintiff cannot recover'."

"If then it is indispensable that the lessor of the plaintiff should show a right of possession in himself, and that the defendants are wrong doers; it is difficult to perceive on what grounds this action can be sustained".

"But if we look at the action of ejectment on principle, and inquire what is its object, it cannot be sustained on any rational ground. It is to recover possession of the land in question; and the judgment, if carried into execution, must be followed by delivery of possession to the lessor of the plaintiff."

"The purpose for which the action is brought, is not to try the *mere abstract right to the soil, but to obtain actual possession; the very thing to which the plaintiff can have no exclusive or private right. This would be utterly inconsistent with the admitted public right.* That right consists in the uninterrupted enjoyment of the possession. The two rights are therefore incompatible with each other, and cannot stand together. The lessor of the plaintiff seeks specific relief, and to be put into the actual possession of the land. The very fruit of this action, therefore, if he avails himself of it, will subject him to an indictment for a nuisance; the private right of possession being in direct hostility with the easement, or use to which the public are entitled; and as to the plaintiff's taking possession subject to the easement, it is utterly impracticable. It is well said, by Mr. Justice SMITH in the case of Stiles v. Curtis that the execution of a judgment in such case, involves as great an inconsistency as to issue an *habere facias* possession of certain premises to A., subject to the possession of B. It is said, cases may exist where this action ought to be sustained for the public benefit, as where erections are placed on the highway, obstructing the public use. But what benefit would result from this to the public? It would not remove the nuisance. The effect of a recovery would only be to substitute another offender against the public right, but would not abate the nuisance. That must be done by another proceeding.

"It is said in the case in Burrow, that an ejectment could be maintained because trespass would lie. But this certainly does not follow. The object and effect of the recoveries are entirely different. The one is to obtain possession of the land, which is inconsistent with the enjoyment of the public right; and the other is to recover damages merely, and not to interfere with the possession, which is in perfect harmony with the public right. So, also, if the fee is supposed to remain in the original owner, cases may arise where perhaps waste or a special action on the case may be sustained for a private injury to such owner. But these are actions perfectly consistent with the public right."

City of Cincinnati v. White's Lessee, 6 Pet., 441-444.

A proprietor of land who has dedicated the land as a public way, cannot recover possession of it, in an action of ejectment, although the legal title to the same remains in him.

Barclay v. Howell's Lessee, 6 Pet., 498.

The same doctrine has always been held in Alabama.

The case of Kennedy v. Jones, which was an action at law, states the law to be that in *ejectment* the plaintiff must have the right of possession as well as the fee.

11 Ala., 86.

And this case has never been overruled. It has been the rule long enough before the judgment herein complained of to be considered a rule of property.

Cofer v. Schening, 98 Ala., 338, 341.

We can say, too, of the Supreme Court of Alabama that the record shows that it did not consider the rights of the plaintiff in error as grantee under a Spanish grant and under the provision of the Treaty with Spain of 1819.

It can be said of it, as was said by this Court of the Court of Errors and Appeals in New Jersey: "The effects of these grants was not considered or determined by the Court of Errors and Appeals of New Jersey in the case of Hoboken Land &c. Co. v. Hoboken, 7 Vroom, 540, and they were not elements in that judgment."

Hoboken v. Penn. R. R. Co., 124 U. S., 693.

And this Court disregarded the rulings of the New Jersey court upon the identical point involved in the other case, decided by the New Jersey Court.

6th., 9th., 12th., 16th., 17th., 56th. Specifications of Error.

The act of Alabama of January 31, 1867, is clearly void because unconstitutional.

The title of the act does not describe its subject as required by Section 2 of Article four of the constitution of Alabama of 1865.

The title is "Granting to the City of Mobile the *Riparian* rights in the river front". What are riparian rights? They are not "shores" or "soil". They are simply *easements*. They are defined as "such as *follow* or are connected with the *ownership of the banks* of streams or rivers". 21 Am. and Eng. Ency. Law (1st Ed.), p. 411.

The body of the act, however, purports to grant and deliver to the City of Mobile "*the shore and soil under Mobile river*, situated within the boundary lines of the City of Mobile, &c". A grant of the *rights* connected with the ownership of the banks of Mobile river is not the same as a grant of the shore and soil under Mobile river, any more than a grant of the right to use an alley-way is not the same as the grant of the alley-way itself.

Hence, it is clear, that the title to the Act of January 31st., 1867, does not describe the subject of it, and the act is unconstitutional.

Ex-parte Pollard, 40 Ala., p. 77.
Weaver vs. Lapsley, 43 Ala., p. 224.
Walker vs. State, 49 *Id.*, p. 329.

No one could infer from the title of the Act, that its purpose was to grant the fee of any land to the City of Mobile. The subject of the title is confined to "riparian rights", which are uses and easements, and nothing more. The "shore and soil" under Mobile river are the things themselves to which riparian rights are only *appendages*. As before said the difference between the subject of the title of the act and that of the body of the act, is as great in degree as would be the difference between the subject of the title of an act purporting to grant to the City of Mobile the use of an alley-way, and that of the body of an act granting to said city the land itself upon which the alley-way is located.

This Court will decide for itself the constitutionality of a state statute whenever the statute itself is directly involved in the case, on writ of error.

Hoboken v. Penn. R. R. Co., 124 U. S., 656, 687.

The identical constitutional point involved in that Hoboken case is involved in this. The State constitution in force when the act of January 31, 1867, was passed was that of 1865.

Section 2, article 4, of that constitution ordains "each law shall embrace but one subject which *shall be described in the title.*"

Code Ala., 1876, p. 91.

9th and 15th Specifications of Error.

Moreover if the law of 1867 was ever a valid law all grants under it to the City of Mobile were revoked absolutely or vested in the trustee for the bondholders of the City of Mobile.

In 1879, the general assembly passed the act entitled "An Act to vacate and annul the charter and dissolve the corporation of the City of Mobile, and to provide for the application of the assets thereof in discharge of the debts of said corporation". Approved Feby. 11, 1879. Pamph. Acts Ala., 1878-79 p. 381.

Section 2 of said act provides for appointment of commissioners by the Governor.

Section 3 provides that said commissioners "shall at once enter upon and take possession of all the property, real and personal, which prior to the passage of this act, belonged to the Mayor, Aldermen and Common Council of Mobile" &c.

Section 7 provides that the Chancery Court of Mobile shall take jurisdiction of the application of the assets of the Mayor, Aldermen, &c., and proceed therein and administer said assets for the benefit of the parties entitled thereto as trust estate under the rules which obtain in said court in such cases as to parties necessary and proper, &c.

Section 8 provides that said commissioners and receivers shall take, hold and possess all the property real and personal, &c. upon the same trust and subject to the same charges, liens and duties as if the same were in the possession of said corporation.

Section 17 provides that the act shall go into effect from and after its passage.

On February 11th, 1879, the General Assembly passed the act

" To incorporate the Port of Mobile and to provide for the government thereof," Pamph. Acts Ala., 1878–9, p. 392.

The first section of the act established the boundaries of the new city, and comparison with the act of Feb. 2d, 1866, referred to in the act of January, 1867, shows that they are *entirely different* from the old boundaries.

Very large portions of the southern, western and northern parts of the extinguished City of Mobile, were excluded from the limits of the new Port of Mobile.

The 37th section of said act repeals all laws and parts of laws in conflict with its provisions.

Dec. 8th, 1880, the General Assembly enacted the act entitled " An Act to adopt and carry into effect the plan &c." Pamph. Acts Ala., 1880-81, p. 329. The preamble to this act recites " Whereas the municipal corporation of this state known as the Mayor, Aldermen and Common Council of the City of Mobile was *dissolved* and its *charter vacated* and annulled, *its assets were placed under the jurisdiction, supervision and direction of the Court of Chancery* for the first district of the Southern Chancery Division of this State, &c."

This shows that the legislative purpose of the two acts of February 11th, 1879, was to *completely obliterate* the old City of Mobile and put *all* of its assets in the hands of the commissioners of the bondholders.

Said act of Dec. 8th, 1880, provides in section 32, for an agent or trustee to succeed the commissioners originally appointed by the governor, and in section 33 provides that "said commissioners shall also transfer and deliver to said agent or trustee *all the property, real and personal*, held by them as such commissioners, and whose disposition is not otherwise provided for in this act, the same shall be held by such agent or trustee upon the trusts that such property was charged within the hands of such commissioners." Pamph. Acts Ala., 1880-81, p. 357.

The only property " otherwise provided for " in said act was the wharves, which were placed under the control of a distinct officer, denominated Superintendent of Wharves.

The State had a right to annul the charter of Mobile and destroy the corporation.

1 Dillon Mun. Corp. (4th Ed.) Secs. 86, 87, 88, 91.
Cooley Const. Lim. (4th Ed.) Secs. 231, 232, 233.

Mt. Pleasant vs. Beckwith, 100 U. S., pp. 525, 526, 528, 530.
New Orleans v. N. O. Waterworks Co., 142 U. S., pp. 79, 89.

There is no connection between the old corporation and the new, and the old corporation has no claim upon public property within the boundaries of the new.

Mt. Pleasant vs. Beckwith, 100 U. S., p. 524.

The foregoing shows that, if ever the act of January 31st, 1867, were valid, all estate vested by it in the old City of Mobile has been withdrawn and is now in the trustee of the bondholders.

The General Assembly had the power to do this.

Illinois Cent. R. R. Co. v. Illinois, 146 U. S., pp. 452, 453, 454, 455, 456, 457, 458, 459, 460, 463.

It was contended in the court below that the property covered by the act of January 31st, 1867, did not pass to the commissioners and trustee under the acts of February 11th, 1879, and December 8th, 1880, before referred to. It was not pointed out in what part of said acts the exception was made which took such property out from under the sweeping grants of the acts aforesaid. But, granted, for argument's sake, this property was so excepted, and became vested in the Port of Mobile and its successor the City of Mobile created by the act "To amend an act entitled an act to incorporate the Port of Mobile, &c.," approved Dec. 10th, 1886. Pamph. Acts Ala., 1886-7, p. 223, and acts amendatory thereof, nevertheless all of these acts incorporating the Port of Mobile and City of Mobile were repealed absolutely by the act "To provide a charter for the City of Mobile", approved February 6th, 1897, Pamph. Acts Ala., 1896-97, p. 542.

This act creates a corporation *de novo*, with new boundaries, different from those of the old city of Mobile, of the port of Mobile, and of the successor of the port of Mobile. It added to the area of the southern part of the preceding city, and cut off from its eastern part all of that lying east of Mobile river known as Blakeley Island. (See Section 1.) The new city is a different geographical entity from any of the previous corporations.

Section 53 of this act of February 6th, 1897, repeals all laws and parts of laws in conflict with this act.

Pamph. Acts Ala., 1896-97, p. 581.

Besides the act of January 31st, 1867, and February 18th, 1895, the defendant in error was allowed to introduce as evidence to the jury the "act to amend an act entitled 'An Act to fix the right of the City of Mobile to certain real estate', approved February 18th, 1895," approved December 5th, 1896.

But this act of December 5th, 1896, was repealed by the later act of February 6th, 1897.

The legislature could do this.

Cooley Const. Lim. (4th Ed.), Secs. 231, 232, 233.
Mt. Pleasant vs. Beckwith, 100 U. S., pp. 525, 526, 528, 530.
1 Dillon Mun. Corp. (4th Ed.) Secs. 86, 87, 88, 91.
Illinois Cent. R. R. Co. vs. Illinois, 146 U. S., 452, 455, 460, 463,

wherein this Court say: "Any grant of the kind is necessarily revocable and the exercise of the trust by which the property was held by the state can be resumed at any time. Undoubtedly there may be expenses incurred in improvements made under such a grant which the state ought to pay; but, be that as it may, the power to resume the trust whenever the state judges best is, we think, incontrovertible. The position advanced by the railroad company in support of its claim to the ownership of the submerged lands, and the right to the erection of wharves, piers, and docks at its pleasure or for its business, in the harbor of Chicago, would place every harbor in the country at the mercy of a majority of the legislature of the state in which the harbor is situated."

It was proved that the land described in the complaint is in the *present* city of Mobile. (Testimony of John Hogan, Trans. p. 74).

The preamble of the Act of December 8, 1880, before referred to, recites that the City of Mobile as it existed under the charter of 1866, which was in force January 31, 1867, was dissolved and its charter vacated and annulled, and its assets were placed under the jurisdiction, supervision and direction of the court of chancery for the First District of the Southern Chancery Division of this State.

"The recital in the preamble of a public act of parliament of a public fact is evidence to prove the existence of that fact. Rex vs. Sutton, 4 Maule & Selwyn, 532; Starkie on Evidence, 197."

Watkins v. Holman, 16 Peters, 55.

52 Specification of Error.

ESTOPPEL.

The tax lists and tax receipts offered in evidence by appellant and excluded were relevant to show, that for more than twenty years after the passage of the act of January 31st, 1867, continuously, the City of Mobile had been assessing the property described in the complaint against the appellant and those through whom it claims, up to the time of commencing this suit.

The tax lists show that the City of Mobile stood by and allowed the appellant to purchase the land sued for and the land of Barnewall and Hogan, as it had itself declared it to be by its assessments for more than thirty years.

A plaintiff may be estopped, in ejectment, from asserting his legal title.

1 Brick. Dig. p. 627, Sec. 33.
Mitchell v. Robertson, 15 Ala., p. 412.
7 Am. and Eng. Ency. Law, (2d. Ed) p. 19.
Dickerson vs. Colgrove, 100 U. S., p. 578.
Kirke vs. Hamilton, 102 U. S., pp. 68, 77, 78.
Drexel vs. Berney, 122 U. S., p. 253.

Sec. 25 of the "Act to consolidate the several Acts of Incorporation of the City of Mobile, and to alter and amend the same", approved February 2d, 1866, introduced in evidence by the defendant in error, enacts that there shall be an officer called the City Tax Assessor, whose duties are defined as follows: "the said assessor shall make an assessment of all the property in said City of Mobile to be assessed," &c. Transcript, p. 20.

Such assessment is a matter of *record* and a *record of declaration* that the property assessed is not city property, made by the city's agent, duly authorized to ascertain the fact. The tax lists offered in evidence by the plaintiff in error and excluded were relevant, in estoppel. The Supreme Court of Alabama has never held that estoppel of the plaintiff may not be shown in an action of ejectment when the estoppel is by a record. Its decisions are in harmony with those of this Court. Sovereign states, even, may be barred by estoppel arising from conduct.

Indiana vs. Kentucky, 136 U. S. 509.

In the case of Brewton v. Spira, 106 Ala., 229, the Supreme Court of Alabama directly hold that the doctrine of estoppel applies to municipal corporations.

They adopt the declarations of this Court in Zabriskie vs. R. R. Co., 23 How., 381, as their rule, saying: "A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind; and cannot, by their representatives or *silence*, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced".

106 Ala., 236.

CONCLUSION.

In his opinion Judge TYSON gives as a reason for the distinction made between this case and the case of Webb v. Demopolis, 95 Ala., that the latter case referred to a portion of the stream above the ebb and flow of tide water, and that the present case is within the ebb and flow of tide water, and, therefore, within the influence of a different rule.

Trans. p. 107.

This distinction made by Judge TYSON between the portion of the Alabama River at Demopolis and that at Mobile, is based upon a revival of the old exploded test of the ebb and flow of tide as the distinguishing mark of a navigable river.

The reports of this Court beginning with the case of "The Thomas Jefferson", 10 Wheat., 428, which is overruled by the case of "The Genesee Chief", 12 How., 244, illustrate the progress of this Court from the acceptance of this test of navigability based upon the ebb and flow of tide, to absolute abandonment, brought about by the recognition of the absurdities, contradictions and mischiefs it led to.

In the case of Peyroux v. Howard, 7 Peters, 343, cited in the brief in support of the doctrine that this Court will judicially notice the geographical location of places for the purpose of determining whether the tide ebbs and flows at that place, and will take cognizance of standard works relating to the territory involved in the case, this Court was still hampered by the doctrine that the ebb and flow of the tide was the only test of navigability, and took judicial notice of a tide at New Orleans, which this Court, twenty-

four years afterwards, described as an evasion of the question by a judicial notice of an occult tide without ebb and flow.

Jackson v. Steamboat Magnolia, 20 How., 302.

The briefs of counsel on both sides in the case of Peyroux v. Howard, show that as a matter of fact the conditions at New Orleans were exactly like those at Mobile, and that had the decision in 7 Howard been rendered today the question of ebb and flow of tide would have had no consideration, whatsoever, by the Court.

In Peyroux's case, in the argument of the appellant, page 330, it is said: "It is by no means conceded that New Orleans is within the ebb and flow of the tide; on the contrary, that the Court will notice the notorious and historical fact that it is beyond the ebb and flow of the tide; that the Missippi River is not an arm of the sea, nor an inlet from the ocean, but an inland river, whose current assumes but one course or flux to the ocean, and is uninfluenced by its tides." Citing beside law reports, Malte Brun's Geography, Vol. 5, p. 58, book 79, ed. of 1826; and Stoddard's Louisiana, 164, ch. 4. * * *

"'The tide is not felt at New Orleans. The rise and fall of the river is caused exclusively by the rainy and dry season in the interior; at low water the flow to the sea is scarcely perceptible.' From the surveyor general of Louisiana. Hall's Travels, vol. 2, 284."

"The tides have little effect upon the water at New Orleans. They 'sometimes' cause it to 'swell' but never to 'slacken its current.' Stoddard's Louisiana, 164, ch. 4."

In the argument for the appellee, in reply to these facts urged by the appellant, Mr. Livingston could only reply:

"If it should be objected that the fact of New Orleans being within the ebb and flow of the sea is not in evidence, the answer is, that there are notorious facts with which courts are supposed to be conversant, and of which they will take notice without further proof. Thus, in the case of La Vengeance, 3 Dall. 297, 1 Peter's Cond. Rep. 132, the court takes official notice of the situation of Sandy Hook; and in the case from 20 Johnson, cited by the defendant, they assume, in like manner, that Salmon river is a fresh water river, and that it has no flux and reflux. In the case before the court, there is moreover the evidence of a public act, making New Orleans a port of entry and delivery."

This is the only reply and citation of facts in opposition to the appellant's evidence.

No wonder this Court in Jackson v. Steamboat Magnolia, as above cited, said: "We could no longer evade the question by a judicial notice of an *occult tide without ebb or flow*, as in the case of Peyroux v. Howard (7 Pet., 343)". 20 How., 302.

It is very clear that the court, in order to reach a desired conclusion, in the case in 7 Peters, created for the purpose "an occult tide without ebb or flow," something unknown to the courts of England,—a country throughout whose whole extent the tides vary in many cases a score of feet, and are always visible; always with ebb and flow; and always to be predicted with the same certainty that attends the prediction of the movements of the sun and moon.

So, in this case, the Alabama judge has created an occult tide without ebb or flow for the purposes of this case.

As was said by Justice GRIER in Jackson v. Steamboat Magnolia, 20 How., 302, of the decision in the case of Peyroux v. Howard, 7 Peters 343, this decision of Judge TYSON establishes an "arbitrary distinction" which, when applied to the Mobile River, has "no foundation in reason."

By the present litigation the owners of the river front of the City of Mobile have been disquieted for the third time in the history of the City, and their title to their property made insecure.

The first time was when this Court by the decision of 3 Howard, 212, Pollard's Lessee v. Hagan, overruled five previous decisions of this Court. (17 Par. Original Bill, Mayor &c. Mobile v. Leverich, October Term, 1874, No. 2.) The mischiefs of that decision were intelligently described by Judge CATRON in his able dissenting opinion. He says in that: "The front of the City of Mobile is claimed by the act of 1824, sanctioned by this Court as a valid grant in the five cases of Pollard v. Kibbe, 14 Peters; of the City of Mobile v. Eslava, 16 Peters, 234; of the same plaintiff against Hallett, 16 Peters, 261; of the same plaintiff against Emanuel, 1 How., 95; and of Pollard v. Files, 2 How., 591. Except the grant to Pollard, the act of 1824 confers the entire title, (so far as is known to this Court), of a most valuable portion and a very large portion of the second city on the Gulf of Mexico in wealth and population. This act is declared void in the present case; and the previous decisions of this Court are, either directly or in effect, overthrown; and the private owners stripped of all

title. On this latter point, my brethren and I fully agree: Can Alabama remedy the evil, and confirm the titles by legislation or by patent? I say by patent, because this State, Louisiana, Mississippi, and surely Florida, will, of necessity, have to adopt some system of giving title, if it is possible to do so, aside from private legislation, as the flowed lands are too extensive and valuable for the latter mode of grant in all instances."

The threatened mischiefs of this judgment so forcibly described by Judge CATRON were finally averted by the adoption of the Code of 1852, which put up a bar of twenty years against the State in actions for the recovery of lands, as is fully shown in the brief. But before the bar of that statute had become complete, the second attack upon the owners of the river front was made by the passage of the legislature of Alabama of the act of January 31, 1867, the subject of this writ of error, in which, under a caption granting riparian rights to the City of Mobile, there followed a section granting the soil and shore under the navigable waters of Mobile River, within the lines of the City of Mobile, to that City.

This at once received a quietus for the time being by the decision in the case of Leverich v. The City of Mobile, in the United States Circuit Court, at Mobile, in 1872. That Court perpetually enjoined the City from making any claim whatever to the wharves in front of the City. This decree covered, by its terms, the whole of the then used river front of the City.

110 Fed. Rep., 170.

A quarter of a century later, when the City had outgrown the *actual (though not the charter)* limits which existed at the time of the decree in the Leverich case, the present attack, the third of the series, was made, which is the cause of the present appeal to this Court. An inspection of the record will show this Court that this attack is as serious and as far reaching as the two which preceded it.

Four propositions have been established by the decision of the Supreme Court of Alabama now before this Court on this writ of error, each involving a federal question.

The first is, that it is sufficient for a complaint to be made in the name of the City, alleging that the lands sued for extend to the channel of the river, with descriptions of boundaries running as far back shoreward as the pleader may choose to allege, and no evidence need be adduced by the City to sustain the complaint, and no evidence of title will be permitted to be adduced by the defendant.

as to any part of the land within the descriptions of the complaint, to disprove the allegations of the complaint, to show whether or not it is alluvion or accretion, or above high water mark, or whether or not it is beyond state interference as a Spanish Grant.

Record pages 10, 75, 76.

The second is, that no time runs against the City, and that there is no prescription, whatsoever, in favor of the citizen—the property owner, notwithstanding the bar against the State has been perfected under the statute of limitations.

Record page 109.

The third is, that a grant by the State includes land below what was high water mark in 1867, including accretions, and that the City can recover all such lands under this grant, notwithstanding they may be accretions or alluvion, or beyond State control as Spanish Grants.

Record page 110.

Judge TYSON says that, "The defendant, however, insists that its third charge, limiting the plaintiff's right to recover the land 'covered by the description in the complaint which is not now below high water mark', should have been given. The argument is, that the description in the complaint takes the western line far inland. That means west of high water line. We do not find this the fact. The description distinctly limits the western line southerly, 'along the high water mark', which would necessarily limit the line to the high tide. *Besides the charge limits the recovery to the present high tide line which might be different from what it was when the grant was made* or the suit commenced."

This argument is made by the Court in the face of the fact that all the evidence was excluded offered by the defendant, and also in face of the fact well known to the Court, and of which the Court will take judicial notice, that the rivers in the great south and western and southwestern portions of this country are ever swaying backward and forward in their valleys, eating out on one side and building up on the other, and that, as a matter of fact, there is no such thing as a stable, permanent line of river bank along any of the great American rivers.

The fourth proposition is clearly implied from the other three, viz: That the State owns all the soil of the City of Mobile between

Royal Street, the high water line in 1819, and the line of high water mark as it was in 1867, and can cause all the present occupants of that territory to be ousted without compensation for their improvements, worth millions of dollars, by granting it to the City.

As Judge CATRON says, all owners of lands in the business part of the City are without title, and as a result they may be despoiled of their property without compensation, if the decision in the Transportation Company case is to stand, whenever the legislature of Alabama sees proper to deprive them of their property. A decision so full of present injustice, and so pregnant with probable and possible mischief in the future, cannot but fall within the ban of the fourteenth amendment of the Constitution, as well as of the clause which forbids the impairment of contractual obligations.

Most assuredly the intelligent people of the second City on the Gulf, and in the matter of fruit importation, lumber export, and trade with Cuba, the second City in the United States, would not have spent their millions in building structures upon land, the title to which vested in the State.

This Court knows that it is the common practice of purchasers of lands to have titles examined by lawyers, and have opinions given by such lawyers, before buying. If these titles were as defective as the judgment complained of makes them, is it reasonable to believe that this fact could have escaped the notice of the bar of Mobile for more than eighty years? Does not the fact that the people of Mobile have been building with confidence upon all this land, show that the best legal opinion of most lawyers held otherwise? We think it does, and that this concensus of opinion outweighs the opinion of the single judge who was the author of the opinion in this record.

The practice of the Supreme Court of Alabama is to refer each case to a single judge. The records are not printed as in this Court, and, therefore, only one judge reads the record in each case, and he is the judge to whom it happens, in the numerical order of submission, to have the record assigned,—the five judges having each his fixed number. These causes are so numerous that no judge has time to read any other records than those personally assigned to him.

Even petitions for rehearing are always referred to the judge delivering the opinion sought to be revised, and he alone decides whether or not there is a probability that he has made some error.

In the majority of cases this system has produced substantial

justice, but occasionally cases come up, like the present one, so momentous in consequences as to merit the consideration of every member on a bench of judges. Such consideration this case can only have in this Court. Fortunately, the action is one in ejectment, and there is nothing in the decree of the Alabama Court that is binding upon this Court, and this Court can re-examine the whole case untrammelled by the rulings of the State Court.

The record in this cause furnishes evidence to suggest the origin of this third attack upon the owners of the river front of the City of Mobile.

The transcript of the record, page 45, shows that the defendant in error at the trial offered in evidence the act approved February 18, 1895, to be found in the Acts of the General Assembly of Alabama, of 1894-95, page 815, entitled "An Act to fix the right of the city of Mobile to certain real estate".

The language of this act is as follows, viz:

"SECTION 1. *Be it enacted by the General Assembly of Alabama*, That the absolute and unconditional title and right to all real estate, rights, and easements, pertaining, or incidental, to any real estate, or any right therein, or thereto, heretofore vested in the board of aldermen and common council of the city of Mobile, or in the Port of Mobile, or in the present city of Mobile, whether held in trust, or otherwise, except such as have heretofore vested in the trustee for the holders of the bonds of the city of Mobile, is hereby vested absolutely, and unconditionally in the city of Mobile, to be by it held, managed, controlled, and disposed of, as to it may seem best.

SEC. 2. *Be it further enacted*, That the said city of Mobile be, and is hereby authorized and empowered to contract and arrange with such person, or persons, as it may think proper, upon such terms as may seem best to it, for the ascertainment, location, and recovery of any part, or the whole, of such property, and the rights hereby vested in it, and may, if it thinks proper to do so, convey to such person, or persons, an interest in said property, and rights, as compensation for his, or their services in such matters."

The second section of this act shows on its face that there was some individual behind its passage with a scheme out of which he was to derive personal advantage, inasmuch as that section authorizes the City to "contract with such person, or persons, as it may think proper, and upon such terms as may seem best to it, for the recovery of any part, or the whole, of such property, and the rights

hereby vested in it, and may, if it thinks proper to do so, *convey* to such person, or persons, an interest in said property, and rights, as compensation for his, or their, services in such matters."

The same page of the same record shows that this act purported to be amended on the 5th. of December 1896, as follows, viz :

"SECTION 1. Be it enacted by the General Assembly of Alabama, That an act entitled "An act to fix the right of the city of Mobile to certain real estate', approved February 18th, 1895, be, and the same is hereby, amended so as to read as follows : Section 1. Be it enacted by the General Assembly of Alabama, That the absolute and unconditional title and right to all real estate, right and easements, pertaining or incidental to any real estate, or any rights therein, or thereto, heretofore vested in the mayor, aldermen and common council of the city of Mobile, or in the port of Mobile, or in the present city of Mobile, or in any municipal corporation of Mobile, however said corporation may have been named or called, whether held in trust, or otherwise, except such as have heretofore vested in the trustee for the holders of the bonds of the city of Mobile, is hereby vested absolutely, and unconditionally in the city of Mobile, to be by it held, managed, controlled and disposed of, as to it may seem best.

SECTION 2. Be it further enacted, That the said city of Mobile be, and is hereby authorized and empowered to contract and arrange with such person, or persons, or as it may think proper upon such terms as may seem best to it, for the ascertainment, location and recovery of any part or the whole, of such property, and the rights hereby vested in it, and may, if it thinks proper to do so convey to such person or persons an interest in said property, and rights, as compensation for his or their services in such matters."

A comparison of the two acts shows that there was substantially no amendment made, but the purpose was simply to get a re-enactment of the confirmation of the contract subsequently to the new charter.

The record also shows, on page 41, that the attorneys representing the City are not the City's attorney, as provided by law. The record shows that B. B. Boone, Esq., well known to this Court, is the real City attorney, and that the attorneys representing the defendant in error in this cause are representing the personal interest created by sections 2 of the acts just cited. The contest, therefore, between the plaintiff in error and the defendant in error is not

a contest of one citizen with the City, but of one citizen with another citizen, and the moving force of this litigation is not the interest of the public, but the profit of private individuals.

The judgment here sought to be reversed has already borne fruit in a number of suits. Thirty-one suits similar to this case are now pending in the State Circuit Court, and others are pending in the United States Circuit Court, at Mobile.

See Brief of Defendant in Error, page 6.

This is the natural result of the decision of the Supreme Court of Alabama. The attorney for the defendant in error claims that the city is vested with the "absolute and unqualified" title to the "shore of the river and soil under it in front of Mobile", by virtue of said Act of January 31, 1867.

Mr. Smith's Brief, pages 35 and 36.

Consequently, such "unqualified" title, if it exists, has been vested by the City of Mobile, as a matter of course, in the lawyers conducting this litigation, as their fee, in accordance with the provisions of said section.

It has been said by this Court that "the power or the sovereign over the streets of a city is limited. He cannot alien them".

New Orleans v. United States, 10 Pet., 720.

If the sovereign cannot alien the highways on land, by the same rule he cannot alien the great water highways.

"Public rivers" are "highways".

Bullock v. Wilson, 2 Port. 436, 445.

Note to Dovaston v. Payne, 2 Smith's Lead. Cas. (9th. Am. Ed.), page 1392.

Counsel for the defendant in error, in his brief in support of his motion to dismiss or confirm the judgment of the Supreme Court of Alabama cites very largely from decisions of other states, to sustain his contention (See especially pp. 40 and 41).

Plaintiff in error has cited only Alabama cases to show the rule in that state prevailing until the judgment was rendered here complained of, and the few other authorities cited are to show that those rulings are in harmony with weightiest authorities, and that the judgment here complained of is a departure from a line of decisions which established property rights, assailed by the judgment complained of.

The decisions of other states should not be looked to overturn the established current of decisions in Alabama.

As was said by this Court in a late case :

" The foregoing summary of the laws of the original States shows that there is no universal and uniform law upon the subject ; but that each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one State to cases arising in another."

Shively v. Bowlby, 152 U. S., p. 26.

Respectfully Submitted,

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